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NO._____

Supreme Court, U.S.
FILED
JUL 15 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1991

CAERNARVON TOWNSHIP, et al.
Petitioners

v.

MORGANTOWN PROPERTIES
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state law unconstitutional facially, and as applied, when it grants solely to landowners, including corporations, the right to petition for a referendum to create a new municipality with complete local government powers, to be carved out of portions of existing incorporated municipalities, but denies that right to resident voters who own no land?

2. Do all citizens of incorporated municipalities out of which it is proposed that a new municipality be carved have an interest substantially similar to that of the voters within the proposed municipality so as to have a constitutional right to vote on a referendum regarding that proposal without being discriminated against by a state law which reserves that right solely to residents within the proposed municipality?

LIST OF PARTIES

Caernarvon Township, Kathleen Hood, Frank A. Pavlesich, Jeanne M. Pavlesich, David L. Sparr, Jeanette Sparr, Victor D. Dodd, Patricia J. Dodd, Gary D. Bergey, Karen M. Bergey, Harry J. Smith and Judith A. Smith were the Appellants in the Supreme Court of Pennsylvania.

Morgantown Properties was the Appellee in the Supreme Court of Pennsylvania.

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OPINIONS BELOW

The Opinion and Judgment of which review is sought is that of the Pennsylvania Supreme Court, dated April 19, 1991, which is officially reported at...Pa..., 590 A.2d 274 (Pa. 1991), and is set forth in full in Appendix A at 1a.

STATEMENT OF JURISDICTION

The Judgment of the Supreme Court of Pennsylvania was

entered on April 19, 1991.

This Court's jurisdiction arises pursuant to 28 U.S.C. Section 1257(a) (1988).

28 U.S.C. §2403(b) may be applicable.

PROVISIONS INVOLVED

This action is based on the Fourteenth Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment to the United States Constitution, and the Pennsylvania Borough Code, 53 P.S. 45101, et seq.

The Fourteenth Amendment, Section One, provides in part:

> ...No State shall make or enforce any law which shall abridge the privileges or imunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Pennsylvania Borough Code, in relevant part, provides:

> The application for incorporation shall be by a petition signed by a majority of the freeholders residing within the limits of the proposed borough, when all parts of the proposed borough are in the same township, and, where portions of the proposed borough are in different townships, the petition shall be signed by a majority of the freeholders residing in each of such separate portions.... 53 P.S. Section 45202(a).

Suit was brought pursuant to 28 U.S.C. Section 1257 (a) (1988), which states:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari...where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

STATEMENT OF THE CASE

On November 18, 1986, the Zoning Hearing Board of Caernarvon Township, Pennsylvania, issued an order voiding a township permit which had been issued to Respondent, a corporate limited partnership, to build a mass-burn trash incinerator. Respondent appealed this order to the Common Pleas Court of Berks County. The individual Petitioners herein petitioned to intervene and Respondent objected but took no further action on its zoning appeal. Appendix 56a, 62a (hereinafter App.).

On August 11, 1987, Respondent filed a Petition for Incorporation of a new borough comprising 3,700 acres owned by Respondent and straddling portions of Petitioner Caernarvon

Township and neighboring Robeson Township. The Petition was signed and filed in Respondent's name only. App 3a, 47a. The proposed mass-burn trash incinerator and a proposed landfill are sited in the proposed borough. App. 18a, 56a. Individual Petitioners herein filed exceptions to the Petition for Incorporation challenging the constitutionality of those sections of the Borough Code of Pennsylvania pursuant to which the incorporation was sought. 53 P.S. 45201 (1966) et seq. (The Code hereafter). App. 56a. Pursuant to the Code the county trial court appointed a Borough Advisory Committee which held hearings and rendered a 3-2 recommendation to the court favoring the incorporation. App. 50a. (The Committee included two members who were tenants and employees of Respondent and who, it was testified at the Committee hearings, expressed a bias by indicating prior to the close of the hearings that they would vote for the incorporation. App. 19a.) The trial court then ordered that a referendum vote be held on the question. Under the Code only those voters within the proposed borough could vote. Of the eleven registered voters residing in the enclave of the proposed borough nine voted for and one voted against

incorporation. (There were seventeen residents in the proposed borough). App. 51a, 62a. The question then returned to the trial court for a hearing preceding the issuance of a final decree. Argument was presented on the issues of constitutionality and bias but no evidentiary hearing was held, although it was requested, and a final decree issued granting the incorporation. App. 47a.

The individual Petitioners herein challenged the constitutionality of the enabling statute at the beginning of the borough incorporation process when they petitioned to intervene, attacking the requirement that one must be a freeholder (landowner under Pennsylvania decisions) to petition for incorporation. They challenged, before the trial court, the limitation of the right to vote on the question to those living in the enclave of the proposed borough to the exclusion of those citizens who do not, but are citizens of the municipalities containing the enclave. Petitioners challenged the alleged bias of the two committee members from the time it became known during the committee hearings. App. 28a, 31a, 45a.

The trial court did not rule on the constitutional and bias

issues. App.40a-46a. On appeal, the Commonwealth Court of Pennsylvania affirmed 2-1. App 21a. 562 A.2d 402 (Pa. Cmwlth. 1989). It held that property ownership is indeed a prerequisite to petitioning for borough incorporation, that this does not impinge on the right to vote and that restricting the right to vote to those in the enclave does not deprive the remaining voters in the affected municipalities of the right to self- determination. As to the bias issue, the Court, without analysis, was "loath" to reverse the trial court. App. 33a. On further appeal, the Supreme Court of Pennsylvania affirmed 6-2. It dispensed with the constitutional and bias arguments in a footnote stating that the critical issue is who may vote on incorporation, not who may apply, that any resident in the proposed borough may vote and that, rather than the right of self-determination of the residents of the affected municipalities being undercut, the residents of the proposed borough could determine their own form of government. Acknowledging that the trial court made no findings of fact on the bias issue, the Supreme Court of Pennsylvania did not view the committee members as judicial officers and concluded that the two members did "no more than

voice the preference for incorporation which might be expected from those who live in the area...." App. 15a.

REASONS FOR ALLOWING THE WRIT

I. THIS CASE PRESENTS A STATE COURT DECISION WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT PROSCRIBING LAND OWNERSHIP AS A PREREQUISITE TO PARTICIPATION IN THE POLITICAL PROCESS AND ALSO PRESENTS THE OPPORTUNITY TO DECIDE WHETHER LAND OWNERSHIP CAN EVER BE A PREREQUISITE TO PETITION FOR A REFERENDUM OF GENERAL APPLICATION.

A. The State Court Decision Conflicts with Decisions of this Court.

The status of landowner (also referred to as "freeholder") as a prerequisite to participation in the political or electoral process has been the subject of many decisions of this Court which have articulated differentiations in treatment dependent upon the purposes and the parties served by the process. The most recent and relevant example is Quinn v. Millsap, 109 S.Ct. 2324 (1989), where a unanimous court held that a state law which requires that one own land in order to be appointed to a board charged with recommending changes in government organization is not rationally related to any legitimate government interest, and

violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The freeholder requirement was not immunized nor saved by the law's provisions that the government reorganization process be initiated by a voters' petition and concluded by a vote of the electorate for or against the plan recommended by the board. That the board was only charged with making recommendations was of no moment. Id. at 2326, 2330-31. This Court found that the board "has the power...to submit a plan to reorganize the entire governmental structure...." and that its work "affects all citizens of the city and county, regardless of land ownership." Id. at 2333.

In the instant case no committee can even be created to consider governmental reorganization (carving out a new municipality from existing municipalities) unless a landowner petitions to initiate the process. Pennsylvania's enabling statute gives this power even to corporate landowners while denying it to human citizens who own no land. As in Quinn, there is no rational basis for the landowner distinction and the Pennsylvania courts and the Respondents have not proferred a rationale for the distinction. It is respectfully submitted that the issue here is

as "straightforward" as it was in Quinn: that "it is a form of invidious discrimination to require land ownership" to empower one with the right to petition for the creation of government." Id. at 2331-32.

Even if the Code at issue could survive a rationality review, it could not survive the strict standard of review urged by the appellants in Quinn which Petitioners also urge this Court to apply. Ibid. ftnt 10.

That the constitutional infirmity complained of here is the inability to initiate the process for governmental reorganization, rather than the inability to participate in making recommendations as in Quinn, is a distinction without a difference. The identical issue in both cases is the power to submit a plan to change governmental structure which will affect all citizens in the affected municipalities whether or not they own land. In the instant case the petition to create a borough includes a description of the land to be included therein. App 48a. The powers of the borough are found in the Borough Code of Pennsylvania. 53 P.S. 45101 (1966) et seq. If the petition is approved by the voters residing in the proposed borough and by

the county court, the borough is created as configured in the petition and is governed by the Borough Code. In Quinn, at least, access to the process was provided through a voters' petition without regard to land ownership, but here it is not. Further, in the instant case, the outcome of the vote on the petition to incorporate the proposed borough was predestined as all its land was owned by Respondent and all seventeen residents, eleven of whom were registered voters, were tenants of Respondent. The landowner could easily manipulate the outcome of the vote on ratification through his power to select tenants. As demonstrated in the Statement of the Case, supra, two of them served on the Borough Advisory Committee and allegedly indicated their bias in favor of the question before the committee's hearings ended. The committee recommended approval of the petition for incorporation by a 3-2 vote.

The foregoing scenario is freighted with considerations of the right of citizens to be free from abridgment of their privileges without due process of law under the Fourteenth Amendment to the United States Constitution. Those privileges presumably include the right to fairness in the process of implementing the

law employed to reform their local government. As no evidentiary hearing was held on the issue of bias, that aspect of the fairness of the process could not be tested. However, even if the bias issue had not arisen, it is difficult to imagine how the process could ever be fair under the facts of the instant case.

In Quinn the facial validity of the law was challenged as well as the law's application to one who did not own land but wished to be considered for appointment to the board. Id. at 2329. The Code here is facially invalid and as applied to Respondent to the exclusion of all non-propertied residents.

The Supreme Court of Pennsylvania did not discuss the decisions of this Court.

B. This Case Presents an Issue of First Impression: Can Land Ownership Ever Be a Prerequisite to Petition for a Referendum of General Application?

If Quinn is not viewed as dispositive of the instant case by analogy, then this Court is presented with an issue of first impression: the constitutionality of a law which makes land ownership a prerequisite to petition for a referendum of general application.

In a number of other cases land ownership prerequisites to

participation in the political process have been ruled upon by this Court as they relate to voting rights and to appointment to or standing for public office. See, e.g., Kramer v. Union Free School District No. 15, et al. , 395 U.S. 621 (1969), which found a statute unconstitutional that limited the right to vote at annual school district meetings to owners or lessees of taxable land and to parents and guardians of school district children; Hill v. Stone, 421 U.S. 289 (1975), which invalidated a "dual box election procedure" for a library bond pursuant to which those rendering property for taxation voted in one box, those without such property voted in another box, and a majority vote in the "renderer's box" plus a combined majority vote of both boxes were required to approve the bond issue; the Court found that the non-renderers could only help defeat the bond issue but could not help pass it, and also found no proof that the non-renderers were substantially less interested than those accorded the fuller vote so as to justify the disparity in voting strength; sufficiently different interests were also found lacking in City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970), where the Court invalidated a law which only permitted real property taxpayers to vote on

general obligation bonds. See also, Turner v. Fouche, 396 U.S. 346 (1970), which struck down freeholder status as a prerequisite to school board membership. However, in specialized district cases, this Court has ruled that voting rights may be tied to land ownership. See, Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719 (1973), and Ball v. James, 451 U.S. 355 (1981), where the Court reasoned that tying the franchise to land ownership in the election of water district directors passed the constitutional test of rationality because of the specialized and limited purpose of the districts involved, and because of the disproportionate impact on landowners. These cases noted that their holdings were limited exceptions to and were supported by prior case law.

The "single-shot" referendum analysis of Town of Lockport v. Citizens for Community Action, 430 U.S. 259, 266 (1977), which upheld a concurrent majority voting system to approve a county charter, elucidates the distinction between elections for legislative representatives and referenda on single issues. The voting system in Lockport required a majority vote by city dwellers and a majority vote by non-city dwellers to approve a

proposed county charter of general governmental powers. A combined majority of the two groups was insufficient for approval. The Court, while ackowledging that the States have wide discretion "in forming and allocating governmental tasks to local subdivisions....," nonetheless applied a two-part test to the voting scheme:

> [W]hether there is a genuine difference in the relevant interests of the groups that the state electoral classification has created; and, if so, whether any resulting enhancement of minority voting strength nonetheless amounts to invidious discrimination in violation of the Equal Protection Clause. Id. at 268-69.

From the facts the Court found sufficiently different interests represented by the two groups to justify the classifications made by the law in equalizing the expression of the two groups.

Just as the non-renderers of property in Hill, supra, were constitutionally handicapped by their truncated participation in a referendum, the non-freeholders in the proposed borough and in the affected municipalities are totally handicapped by never being able to initiate a borough incorporation referendum. They can only vote if and when a freeholder files a petition and they are limited to the question as proposed by the freeholder. Yet, the

legitimate interests of freeholders and non-freeholders in general governmental affairs cannot, under the above precedents, be said to be sufficiently dissimilar to support the difference in their voting process rights.

No decision of this Court supports the scheme of the subject Code.

II. ALL CITIZENS OF INCORPORATED MUNICIPALITIES OUT OF WHICH A NEW MUNICIPALITY IS PROPOSED TO BE CARVED HAVE AN INTEREST SUBSTANTIALLY SIMILAR TO THAT OF VOTERS WITHIN THE PROPOSED MUNICIPALITY AND HAVE AN EQUAL RIGHT TO VOTE IN A REFERENDUM PROPOSING THE CREATION OF THE NEW MUNICIPALITY.

The discussion in section I.B. above is incorporated herein by reference. Under the precedents cited therein relating to voting rights, it is a denial of the Equal Protection of the Law to deny the vote on the referendum for borough incorporation to the residents of the affected municipalities who live outside the limits of the proposed borough. Their interest in the question is substantially similar, if not greater, than that of the residents in the proposed borough. In contrast to Lockport, supra, where the votes of two groups with dissimilar interests were equalized, here the constituencies of the affected municipalities living outside the

proposed borough are totally deprived of the vote.

Reliance by Respondent herein on annexation cases to prop up the subject Code is of no avail. While it is true that the States have wide latitude in shaping local governments (see, Hunter v. Pittsburgh, 207 U.S. 161 (1907)), the Pennsylvania Constitution states, in part, at Article IX, Section 8:

> Initiative. The electors of any municipality shall have the right, by initiative and referendum, to consolidate, merge and change boundaries by a majority vote of those voting thereon in each municipality, without the approval of the governing body....PA. Const. Art. IX, Sec. 8. (Emphasis supplied.)

The foregoing section also provides that the State legislature could have enacted uniform legislation regarding consolidation, merger or change of boundaries within two years of adoption of Article IX. However, the legislature failed to act and the constitutional procedure cited above controls annexations. See, In Re: Establishment of Boundary Between Collier Township and Robinson Township, 25 Pa. Cmwlth. 230, 360 A.2d 841 (1976); cf. Derry Township v. Borough of Hummelstown, 458 Pa. 396, 326 A.2d 342 (1974). Reliance on Pennsylvania's annexation law would warrant the conclusion that all the voters in the affected municipalities should have been permitted to vote on

the question of borough incorporation.

III. FREEHOLDER CONCEPTS REMAIN INBEDDED IN VARIOUS STATES' LAWS DEPRIVING CITIZENS OF THEIR CONSTITUTIONAL RIGHTS AND THIS CASE PRESENTS AN OPPORTUNITY TO FURTHER DEFINE THE LIMITS OF THE FREEHOLDER PREREQUISITE.

A partial survey of various jurisdictions discloses that land ownership still plays a significant and questionable role as a prerequisite to participation in politics, government administration and even the judiciary:

ALABAMA -

Freeholder or householder to serve in canvassing election returns. Ala. Code Sec. 17-14-1 (1975).

Freeholder or householder to serve as commissioner alloting estate exemptions. Ala. Code Sec. 6-10-103 (1975).

ARIZONA -

Freeholder to serve as commissioner setting county highway bond issue. Ariz. Rev. Stat. Sec. 18-232.

ARKANSAS -

Freeholder to review proposal to establish a road. Ark. Code Ann. 14-298-115 (1987).

Freeholder to assess damages caused by grading of public streets and grounds. Ark. Code Ann. 14-301-105.

COLORADO -

Freeholder to petition for appointment of committee to investigate county treasury. Colo. Rev. Stat. Sec. 30-10-722 (1990).

Freeholder to determine compensation in eminent domain matters. Colo. Rev. Stat. Sec. 38-1-105 (1989).

DELAWARE -

Freeholders to petition for the creation of a suburban park community. Del. Code Ann. tit. 9 Sec. 625 (1953).

Freeholders to serve on board of assessment. Del. Code Ann. tit. 9 Sec. 1304 (1953).

Freeholders to serve as voting inspectors. Del. Code Ann. tit. 15 Sec. 5306 (1953).

Freeholders to make real estate partitions. Del. Code Ann. tit. 25 Sec. 745 (1953).

FLORIDA -

Freeholders vote on inclusion or exclusion of their land in proposed spaceport territory. Fla. Stat. Ann. Sec.

331.329 (West 1953).

Freeholders vote to create supervised recreation system. Fla. Stat. Ann. Sec. 418.08 (West 1953).

Freeholders vote to authorize construction of public housing project. Fla. Stat. Ann. Sec. 421.54 (West 1953.)

Freeholders vote to create special residential or business neighborhood improvement districts. Fla. Stat. Ann. Sec. 163.511 (West 1953).

GEORGIA -

Freeholders petition to disqualify tax assessors. Ga. Code Ann. Sec. 48-5-296 ( ).

Freeholders appraise and settle decedent estates. Ga. Code Ann. Sec. 53-4-12 ( ).

MICHIGAN -

Freeholders petition to create township or change borders. Mich. Comp. Laws Ann. Sec. 46.14 ( ).

Freeholders to serve on village charter revision commission. Mich. Comp. Laws Ann. Sec. 78.14 ( ).

Freeholders petition to incorporate village. Mich. Comp. Laws Ann. Sec. 81.3 ( ).

MISSISSIPPI -

Freeholders to serve as supervisors of local government. Miss. Code Ann. Sec. 19-3-3 (1972).

MISSOURI -

Freeholder to serve on county planning commission. Mo. Ann. Stat. Sec. 64.520 ( ).

SOUTH CAROLINA -

Freeholders petition for annexation. S.C. Code Ann. Secs. 5-3-20, 5-3-50 (1976).

Freeholders petition for municipality to establish hospital. S.C. Code Ann. Sec. 44-7-920 (1976).

VIRGINIA -

Freeholders appointed to settle border disputes between municipalities. Va. Code Ann. Sec. 15.1-1026 (1950).

Freeholders petition for election to determine if a housing authority should be created. Va. Code Ann. Sec 36-4 (1950).

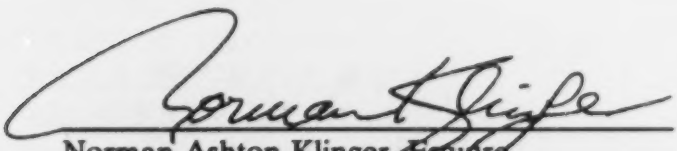
Granting a writ of certiorari in this case and deciding it on the merits will settle an important constitutional question of national scope and bring Pennsylvania law into line with the

precedents of this Court.

CONCLUSION

For all the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,



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Supreme Court of Pennsylvania

Eastern District

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	: No. 78 E.D. Appeal Docket : 1990
APPEAL OF CAERNARVON TOWNSHIP, BERKS COUNTY, PENNSYLVANIA, ROBESON TOWNSHIP, KATHLEEN HOOD, et al. and HARRY J. SMITH, et al.	:

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the Order of the COMMONWEALTH COURT, be, and the same is hereby affirmed.

_____

Charles W. Johns, Esquire
Prothonotary

Dated: April 19, 1991

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	: No. 78 E.D. Appeal : Docket 1990
	: Appeal from the Judgment of : the Commonwealth Court of : Pennsylvania, Nos. 1343 C.D. : 1988, 1344 C.D., 1988 & 1345 : C.D. 1988 entered July 17, : 1989, affirming the Decree : entered by the Court of : Common Pleas of Berks : County No. 193 Misc. Docket : 1987.
APPEAL OF CAERNARVON TOWNSHIP, BERKS COUNTY, PENNSYLVANIA, ROBESON TOWNSHIP, KATHLEEN HOOD, et al. and HARRY J. SMITH, et al.	: 127 Pa. Cmwlth. 519, : 562 A.2d 402 (1989). : ARGUED: January 15, 1991

OPINION OF THE COURT

MR. JUSTICE FLAHERTY Filed: April 19, 1991

The question presented on this appeal is whether the Court of Common Pleas of Berks County abused its discretion in granting the petition of Morgantown Properties for incorporation of the Borough of New Morgan and whether Commonwealth Court erred in affirming the trial court's order.

This case arose when Morgantown Properties, a limited partnership, filed a petition to incorporate a tract of land it owned in Berks County. The proposed borough consisted of 3,700 acres, part of which is located in Caernarvon Township, and part of which is located in Robeson Township. Morgantown Properties is the sole owner of the entire tract of land to be incorporated, and there are only six occupied homes in the proposed borough. Morgantown's proposal is to develop the land with a landfill, a trash-to-steam plant, a tourist attraction which it calls a Victorian village, a golf course, a cultural center, a mixed use center, commercial areas, agricultural areas, and open space areas.

Pursuant to the Borough Code, the Court of Common Pleas of Berks County established a Borough Advisory committee consisting of two residents of the proposed borough, one resident

of Caernarvon Township, one resident of Robeson Township, and a fifth member who was a resident of Berks County, but did not reside in either affected township or in the proposed borough. The fifth member acted as chairman of the committee. Additionally, pursuant to the Borough Code, the court appointed the director of the Berks County Planning Commission as advisor to the committee.

After conducting more than 100 hours of hearings, the committee voted three to two in favor of incorporation. Both the majority and the minority of the committee wrote reports and the court adopted the findings of fact and conclusions of law of the majority report. On appeal, a panel of Commonwealth Court affirmed the trial court with one judge dissenting. Caernarvon Township, Robeson Township, Kathleen Hood, et al., and Harry J. Smith et al. (hereinafter "appellants") petitioned for allowance of appeal and we granted allocatur primarily to address the question of whether, under the Borough Code, the trial court abused its discretion in granting the petition for incorporation of a borough where the land involved is a large tract owned by a sole landowner whose purpose, at least in important part, is to

utilize the land for a landfill.

The preliminary steps to be followed in creating a new borough are found in the Borough Code, Act of February 1, 1966, as amended, 53 P.S. § § 45201-45219. Section 45201 provides the the courts of common pleas have authority to incorporate certain areas within their jurisdiction. Section 45202(a) provides that application for incorporation shall be by petition to the court of common pleas, and where, as here, the proposed borough is located in different townships, the petition must be signed by a majority of freeholders within the proposed borough residing in each township.

Section 45202(b), as it applies to this case, provides that when a petition for the creation of a borough is received by the court, the court shall establish a Borough Advisory Committee consisting of two residents of the proposed borough, two residents of the existing governmental units not residing in the proposed borough and recommended by the governing bodies of those units, and one resident of the county not residing in either area to serve as chairman.

Section 45202(c) provides for the work of the committee as

follows:

> Such committee shall. . . advise the court in relation to the establishment of the proposed borough. In particular, the committee shall render expert advice and findings of fact relating to the desirability of such an incorporation, including, but not limited to, advice as to:
>
> > (1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;
> >
> > (2) the existing and potential commercial, residential and industrial development of the proposed borough; and
> >
> > (3) the financial or tax effect on the proposed borough and existing governmental unit or units.

The requirements of this section are augmented by Commonwealth Court's decision in Bear Creek Township v. Penn Lake Park Borough, 20 Pa. Cmwlth. 77, 340 A.2d 642 (1975), that the area proposed for incorporation also must be one harmonious whole with common interests and problems which can be properly served by borough government. Finally, Section 45202(c) provides:

> The court, if it shall find, after hearing and advice of the committee, that the conditions

> prescribed by this section have been complied with, shall certify the question to the board of elections of the county for a referendum vote of the residents of the proposed borough. Upon receipt of the certified election results, the court shall enter a final decree granting or denying the prayer of the petitioners.

Caernarvon and Robeson Townships, Kathleen Hood et al., and Harry J. Smith et al., formulate the issues in this case as follows:

> A. Whether the borough incorporation statute permits the creation of a borough where the proponent's motivation for incorporation is to bypass zoning and land development restrictions of the affected townships?
>
> B. Whether the proposed borough constitutes a harmonious whole?
>
> C. Whether the disadvantages to Caernarvon and Robeson outweigh the advantages of incorporation of the borough of New Morgan?

Our standard of review is to affirm the trial court's findings of fact unless they are not based upon competent evidence, 2401 Penn Ave. v. Fed. of Jewish Agencies, 507 Pa. 166, 489 A.2d 733 (1985) or unless the court's conclusions of law are not reasonably based upon its findings of fact. Karis v. Karis, 518 Pa. 601, 544 A.2d 1328 (1988).

The first of the appellants' claims is that Morgantown's motive for the incorporation was to avoid the townships' zoning regulations, that this is an impermissible motive, and, therefore, that its application for incorporation should have been denied. The Commonwealth Court case cited by the appellants in support of this claim, In re Incorporation of Borough of Bridgewater, 87 Pa. Cmwlth. 599, 488 A.2d 374 (1985), stands for the proposition that incorporation of a borough may be denied when it is demonstrated that the applicant's motive is racial segregation. The case does not stand for the broad proposition that incorporation may be denied when the applicant has an "improper motive." Indeed, the legislature has been silent on the matter of motive, and Pennsylvania cases have turned on motive only where racial discrimination was at issue. Absent, therefore, fundamental constitutional concerns or other direction from the General Assembly, we do not understand inquiry into motive of the applicant to be appropriate.

Even if it were, however, and even if avoiding existing land use regulations were deemed an improper motive, appellants have failed to show improper motive. The majority of the

advisory committee found:

> Applicant is basically motivated by a desire to establish an independent governmental agency which will complement the conceptual theme of cohesive combination of related but unique land and development uses unfettered by unreasonable governmental restraints.

The majority report concluded:

> [T]he incorporation. . . is not intended to circumvent existing land use controls but will encourage large scale economic development to an otherwise dormant segment of the Townships.

R. 84a, 86a. These findings are supported by the record and were adopted by the trial court. In reviewing this issue, Commonwealth Court wrote:

> We do not doubt that Applicant is motivated in part by a desire to escape certain governmental controls. However, that desire is not necessarily contrary to the Borough Code, nor is it the sole motivating factor. Carr testified that financial backing is contingent, to some extent, on the degree of control held by the developer. In addition, the borough is located in two townships. As such, coordination of local zoning ordinances would be required. Under these circumstances, the trial court did not abuse its discretion in granting incorporation.

In re Incorporation of Borough of New Morgan, 127 Pa. Commonwealth 519, 534, 562, A.2d 402, 409 (1989).

In short, the appellants have failed to demonstrate that Morgantown's motivation was to avoid existing zoning and land use restrictions, but even if they had demonstrated this, neither the statute nor our caselaw prohibits such avoidance. In fact, the entire incorporation process is predicated on the applicant's notion that the proposed borough's regulations, whatever they are, are preferable to those of the existing governments from which the proposed borough is derived.

Appellants' second claim is that the application does not meet Commonwealth Court's Bear Creek requirement that the borough be a harmonious whole with common interests and problems which can be properly served by borough government.

After hearing from planners, developers, architects and others, the committee and the trial court determined that the proposed borough was a harmonious whole. The plan, in sum, is to create a large landfill, a trash-to-steam generator plant, a national tourist attraction which would draw 25,000 visitors per day, a 1,000 room luxury hotel, a residential area complementing the Victorian theme of the tourist attraction, open spaces, and commercial areas. The cost of building the plan would

approximate $800,000,000. Over 12,000 persons would be employed and a permanent population of 9,000 would emerge.

To the extent that the needs of the various commercial, residential and public uses of the proposed borough must be coordinated to accommodate the projected increase in traffic and population in an area that was heretofore virtually unpopulated, a borough government would plainly be appropriate.[1] We agree with Commonwealth Court that the Court of Common Pleas did not abuse its discretion in finding that the plan constituted a

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[1]The findings of the Borough Advisory Committee (majority) with respect to whether the proposed borough is a harmonious whole, in pertinent part, are as follows:

> 3. Each part of the development is an integral part of the planned community.
>
> • • •
>
> 5. The community as a whole is bound by a single theme different from the "rural village residential" theme of the existing townships.
>
> • • •
>
> 7. The area proposed for incorporation presents a harmonious whole, with an entirely different community of interests separate and apart from the interests of the remainder of Caernarvon and Robeson Townships.

Findings of Fact, Borough Advisory Committee report, p. 28.

harmonious whole.[2] [3]

Next, the appellants claim that the disadvantages of incorporation to Caernavron and Robeson Townships outweigh the advantages to New Morgan. The essence of the appellants'

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[2]Commonwealth Court stated:

> We have exhaustively reviewed the record in this case, and we are unable to conclude that the trial court erred in finding that the proposed borough is a harmonious whole. Applicant presented numerous exhibits, including detailed maps of the proposed borough, geological reports, water testing reports, and a comprehensive report detailing the development of the borough. This supports a finding that the proposed borough would be one harmonious whole.

In re Incorporation of New Morgan, 127 Pa. Cmwlth. at 532-33, 562 A.2d at 409.

[3]Appellants argue that it is incongruous to talk about the plan as a harmonious whole when it entails hosting a 250 acre landfill designed to hold more than 33,000,000 cubic yards of waste materials piled to a depth of 200 feet, which will be filled at the rate of 5,000 tons per day over a twenty year period, and which will be delivered by 370 round trips per day -- all of this next to a national tourist attraction. R.R. 66a.

Admittedly, there is a certain cognitive dissonance involved in the juxtaposition of a trash facility with a tourist attraction, and, in fact, that cognitive dissonance may, to some degree be at the heart of this dispute. Building Disneyland next to a municipal waste dump strikes one as odd.

Nonetheless, cognitive dissonance is not the deciding factor in determining whether an area is a harmonious whole. Here, the proposed land uses require a coordinated effort of government to allow them to work together. The adjoining rural residential townships have quite different problems than the usages proposed in this application, which will be high in volume of traffic and in the amount and quality of services required, and which will, therefore, require a unified governmental approach.

argument here is that if one looks to the future, the townships will lose approximately $2,600,000 in lost tax revenue and fees to be paid for hosting a solid waste disposal facility,[4] and in any event, the townships will be burdened, if the plan is carried out, by substantially increased traffic and expense for road maintenance.

This claim is without merit. First, in considering the loss of taxes and fees, the proper focus is those which may be presently lost, not those which may be lost in the future. The present loss of $9,917 to Caernarvon Township and $1,265 to Robeson Township are not losses of sufficient dimension to turn the balance against approval of Morgantown's application. Second, balancing the disadvantage to the townships of increased road maintenance against the need for incorporation, the balance rests in favor of incorporation, for the maintenance of roads leading to the proposed borough is a relatively minor matter as against the advantages of incorporation.[5] [6]

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[4]53 P.S. § 4000.1301 imposes a $1.00 per ton host municipality benefit fee to be paid to municipalities hosting solid waste disposal facilities.

[5]The Borough Advisory Committee's report (majority) makes the following findings with respect to the balance of advantages and disadvantages:

1. The large area to be developed which remains unsettled and with virtually no population lends itself to "self-styling"; and, therefore, would not disadvantage the remaining townships.

2. The existing municipalities, not having encouraged nor provided incentives to the applicant or previous owners to develop the area, would now welcome the new development and, therefore, not suffer any significant adverse effects.

3. The economies of all municipalities can only benefit from the development of the heretofore dormant tract. Success will breed success.

Borough Advisory Committee Report, Findings of Fact, p. 29. Our review of the record indicates that the record supports these findings and, therefore, that the court of common pleas did not abuse its discretion in adopting them.

*The majority of the Borough Advisory Committee reached, inter alia, the following conclusion of law:

11. To the extent the new borough over-burdens the public facilities of the adjoining Townships, the Legislature [sic] enablements of the Acts of July 12, 1972 P.L. 762 (53 P.S. 481); May 29, 1956 P.L. 1845 (53 P.S. 491); July 9, 1985 P.L. 187 (53 P.S. 1621.1) should be fully explored and utilized.

R.R. 86a. Section 1621.1 provides as follows:

(a) Findings.–The General Assembly encourages and supports economic growth and development throughout Pennsylvania. However, the General Assembly recognizes that, in many instances, transportation facilities and services are either not available or no longer adequate to support the industrial, commercial and residential growth and development of a specific area. With Federal aid on the decline, the available State and local funding capabilities cannot always keep up with the transportation needs of an area. This shortfall

For the foregoing reasons, the order of Commonwealth Court is affirmed.[7]

> necessitates the creation of new means of financing transportation projects.
>
> (b) Purpose.–The purpose of this act is to enable municipalities to cooperate with one another and with the private sector to provide funding for transportation project in areas where economic growth and development has made the transportation facilities and services inadequate.

Act of July 9, 1985, P.L. 187, No. 47, as amended by Act of July 2, 1986, P.L. 394, No. 75, § 1, 53 P.S. § 1621.1.

[7]The appellants also raise a number of additional assertions of error.

The first additional claim is that two members of the Borough Advisory Committee were biased and the committee's recommendation should be either declared void and the minority report should govern, or a new committee should be appointed and de novo hearings conducted. The two members in question resided in the proposed borough and rented property from Morgantown, the sole landowner in the area. One of these members worked for Morgantown and both allegedly indicated to a private citizen prior to the conclusion of deliberations that they favored incorporation.

Appellants objected at the committee hearing that these two committee members were biased and requested that they recuse themselves. They declined. Although the trial court made no findings of fact on the issue of bias, it did not overturn the committee's deliberations. We also declined to overturn the committee's deliberation. First, committee members are not judicial officers, who are expected to be aware of the impropriety of commenting on a case in progress. Second, where the statutory committee selection process requires the selection of two persons living within the proposed borough, and where the committee members have done no more than voice the preference for incorporation which might be expected from those who live in the area, we are reluctant to invalidate a deliberative process which has consumed more than 100 hours of testimony, 18 volumes of transcript, and 67 exhibits, and which the trial court declined to overturn.

The Borough Code contemplates that the various members of the committee may have biases for and against the application, and, thus, the

membership of the committee is formed by selecting members from different geographical areas. It is not surprising, therefore, that the minority report, opposing incorporation, was written by the two members of the committee who were members of the Board of Supervisors of Robeson and Caernarvon Townships, respectively. On the facts of this case, we perceive no abuse of discretion on the part of the trial court.

The next issue is whether it was error to permit the creation of a borough out of portions of two municipalities where there were no freeholders residing in one of the municipalities. This claim is without merit because Morgantown is the sole freeholder of the entire tract and is a resident of the tract. The fact that its offices are located in one township and not the other is of no consequence.

Appellants also assert that a limited partnership is not a freeholder residing within the limits of the proposed borough as required by 53 P.S. 45202(a), and is therefore not authorized to petition for the creation of a borough. The applicant in this case, Morgantown Properties, is a Pennsylvania limited partnership.

The trial court found that Morgantown's principal place of business and residence is within the boundaries of the proposed borough. Commonwealth Court has held in Canterbury Village Appeal, 75 Pa. Cmwlth. 334, 462 A.2d 865 (1983) that a corporate freeholder may petition for incorporation of a borough. Since Morgantown is a resident of the proposed borough and since corporate freeholders may petition for incorporation of a borough, we agree with the lower courts that there should be no impediment for Morgantown, a limited partnership, to apply for incorporation of a borough.

Next, it is claimed that the Borough Code is unconstitutional in that it requires property ownership in order to apply for incorporation. This argument, too, must fail, for the constitutionally critical consideration is who may vote, not who may apply, and although only freeholders are permitted to apply for incorporation, any resident of the area affected may vote on the issue.

Appellants also assert that the Borough Code is unconstitutional because it undercuts the right of self-determination of the residents of existing communities. We disagree. The glass is half full, not half empty. The code permits the residents of the proposed borough to voice their views and to determine the form of government under which they will live.

Finally, appellants claim that the Borough Code violates Article IX, Section 8 of the Pennsylvania Constitution. This claim also is without merit.

Mr. Chief Justice Nix did not participate in the consideration or decision of this case.

Mr. Justice McDermott files a dissenting opinion which is joined by Mr. Justice Larsen.

Commonwealth Court properly addressed this issue in Bear Creek Twp. v. Penn Lake Park. Borough, 20 Pa. Cmwlth. 77, 340 A.2d 642 (1975), where it held that Article IX, Section 8, relating to the procedures for consolidation, merger or change of the boundaries of a municipality, has no application to the incorporation of a borough. We see no reason to disturb this holding.

IN THE SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	: No. 78 E.D. Appeal : Docket 1990 : : : : Appeal from the Judgment of : the Commonwealth Court of : Pennsylvania, Nos. 1343 C.D. : 1988, 1344 C.D., 1988 & 1345 : C.D. 1988 entered July 17, : 1989, affirming the Decree : entered by the Court of : Common Pleas of Berks : County No. 193 Misc. Docket : 1987.
APPEAL OF CAERNARVON TOWNSHIP, BERKS COUNTY, PENNSYLVANIA, ROBESON TOWNSHIP, KATHLEEN HOOD, et al. and HARRY J. SMITH, et al.	: : 127 Pa. Cmwlth. 519, : 562 A.2d 402 (1989). : : ARGUED: January 15, 1991 : : : :

DISSENTING OPINION

MR. JUSTICE McDERMOTT Filed: April 19, 1991

I dissent from the majority opinion and cite as my

reasons the arguments contained in the appellant's brief[1] and the dissenting opinion of Judge Barry in the court below regarding allegations of bias demonstrated by members of the New Morgan Committee.

As the record discloses two members of the court-appointed Borough Advisory Committee were tenants of the appellee; one being a full time employee. Both had indicated prior to the close of the hearings that they intended to vote in favor of the appellee's position. Despite a motion to disqualify these members from further participation in the proceedings, the trial court denied the request without having made findings of fact on the issue of bias. They were but two representatives of the six occupied homes in the proposed borough. While neutrality may be hard to come by under this anomalous procedure, a fixed position of an employee of an applicant ought not to be countenanced. I would remand for such an inquiry.

Further, I dissent from the view that an improper

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[1]Appellants argue that inasmuch as the committee members serve at the pleasure of the Court, and their responsibilities are delegated to them by the Court, they are officers of the Court and, as such, bound by the Code of Judicial Conduct. They are therefore charged with observing the same standards of fidelity applicable to a judge. Appellants' brief at 25.

motive is confined only to attempts to racially segregate. In re Incorporation of Borough of Bridgewater, 87 Pa.Cmwlth. 599, 488 A.2d 374 (1985) does not hold that racial segregation is the only improper motive that may be considered. It holds that it is an improper motive, but does even suggest that it is the only one conceivable. The applicants here are the sole owners of 3,700 acres with only six occupied homes. They have grandiose plans for what they hope will be a tourist attraction on a landfill capped by a trash to steam plant. The majority would find no possibility of improper motive even if the sole purpose were to avoid local zoning regulations. If applicants are dissatisfied with local zoning laws, they ought not lightly be allowed to start their own municipality to evade those laws. The surrounding municipalities ought not be required to surrender their sovereignty or their land for what amounts to commercial fiefs or zoning raiders. Certainly to gerrymander a new governmental unit between two existing communities to evade zoning regulations is destructive of the "harmonious whole" and the legitimate expectations of settled, self-supporting communities, and to my mind improper motive.

Mr. Justice Larsen joins this dissenting opinion.

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	:IN THE COMMONWEALTH :COURT OF :PENNSYLVANIA :(562 A.2d 40
KATHLEEN HOOD, et al. and HARRY J. SMITH, et al., Appellants	: NO. 1343 C.D. 1988

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	: IN THE COMMONWEALTH : COURT OF : PENNSYLVANIA
ROBESON TOWNSHIP, BERKS COUNTY PENNSYLVANIA Appellant	: NO. 1344 C.D. 1988

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	: IN THE COMMONWEALTH : COURT OF : PENNSYLVANIA
CAERNARVON TOWNSHIP, BERKS COUNTY PENNSYLVANIA Appellant	: NO. 1345 C.D. 1988

BEFORE; HONORABLE DAVID W. CRAIG, Judge
HONORABLE FRANCIS A. BARRY, Judge
HONORABLE MADALINE PALLADINO, Judge

ARGUED: March 7, 1989

OPINION BY JUDGE PALLADINO FILED: July 17, 1989

Caernarvon Township, Robeson Township (Townships), Kathleen Hood, et al., and Harry J. Smith, et al. (Intervenors) (collectively, Appellants) appeal from a decision of the Court of Common Pleas of Berks County (trial court) granting the petition of Morgantown Properties to incorporate the Borough of New Morgan.

The present dispute arises from the petition of Morgantown Properties (Applicant) to incorporate as a borough a tract of land it owns in Berks County. The prescribed procedure for the creation of a new borough is found in the Borough Code, Act of February 1, 1966, P.L. (1965) 1656, as amended, 53 P.S. §§45101-48501. Specifically, sections 201-219 of the Borough Code, 53 P.S. §§45201-45219, govern the preliminary steps relating to incorporation of a borough. Section 201 authorizes courts of common pleas to incorporate an area within their jurisdiction as a borough. Section 202(a) provides that the application for incorporation shall be a petition to the court of common pleas. In addition, section 202(a) provides that where the proposed borough is entirely in one township, the petition must be signed by a majority ,of the

freeholders residing within the proposed borough. Where, as here, the proposed borough encompasses portions of different townships, the petition must be signed by a majority of the freeholders residing in each of such separate portions.

Section 202(b) requires the court of common pleas to establish a Borough Advisory Committee comprised of two residents of the proposed borough, two residents of the existing governmental units or units,[1] and one resident of the county not residing in either area, who serves as the chairman of the committee. In addition, section 202(b) provides that the director of the County Planning Commission shall serve as an advisor to the committee.

Section 202(c) provides, in pertinent part:

> (c) Such committee shall ... advise the court in relation to the establishment of the proposed borough. In particular, the committee shall render expert advice and findings of fact relating to the desirability of such an incorporation, including, but not limited to, advise as to:
>
> > (1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;

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[1]The two residents from the existing governmental unit or units are recommended by the respective governing body of the unit or units. These two members of the committee may not be residents of the proposed borough. Section 202(b).

(2) the existing and potential commercial, residential and industrial development of the proposed borough; and

(3) the financial or tax effect on the proposed borough and existing governmental unit or units.

53 P.S. §45202(c). Section 202(d) provides, in full:

(d) The court, if it shall find, after hearing and advise of the committee, that the conditions prescribed by this section have been complied with, shall certify the question to the board of elections of the county for a referendum vote of the residents of the proposed borough. Upon receipt of the certified election results, the court shall enter a final decree granting or denying the prayer of the petitioners.

53 P.S. §45202(d).

Section 204 sets forth various regulations for notice and payment of costs and expenses associated with the petition. Section 205 relates to the date upon which the borough government becomes effective. Section 206 provides that when the proposed borough embraces lands used exclusively for "farming or other large and unsettled lands, the court may, if it deems such land does not properly belong to the proposed borough, at the request of any party aggrieved, change the boundaries ... to exclude ... the land used for farming or such other purposes." Section 207 provides for the naming of the borough. Section 208 sets forth the requisites for

the charter of the borough. Sections 210-219 govern various issues relevant to the post-incorporation period of the borough. None of these post-incorporation sections is at issue in this appeal.

On August 11, 1987, Applicant, a Pennsylvania limited partnership, presented to the trial court a petition for incorporation of the Borough of New Morgan. The petition was signed by Raymond Carr (Carr), who is president of Culbertson Lakes, Inc., Applicant's sole general partner, and was joined in by Hays Run Associates as a tenant in common. Inasmuch as Applicant is the sole freeholder in the proposed borough,[2] the petition was deemed to have been signed by a majority of the freeholders residing in the proposed borough, as required by section 202(a). Accordingly, pursuant to section 202(b) of the Borough Code, the trial court established a Borough Advisory Committee, consisting of the required number of persons from each area and a chairman. Thereafter, the committee held over 15 hearings and heard more than 100 hours of testimony. The committee rendered a 3-2 decision, with the majority in favor of incorporation. Both the

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[2]Applicant's status as sole freeholder in the proposed borough is undisputed; no issues concerning Hays Run Associates' status as a tenant in common have been raised.

majority and minority issued a report to the trial court. The majority report included detailed findings of fact and conclusions of law, which the trial court adopted and incorporated into its opinion. In Re: Incorporation of Borough of New Morgan, (No. 193 Misc. Dkt., filed September 22, 1988), slip op. at 2. The facts are as follows.

The proposed borough is comprised of approximately 3671 acres of land, 2394 of which are presently located in Caernarvon Township. The remaining 1277 acres are located in Robeson Township. Applicant purchased the property from Beth Energy Mines, Inc. on June 1, 1985. Applicant's principal place of business and office are located within the area of the proposed borough. Applicant is the only property owner in the proposed borough, although there are six occupied homes on the premises. Applicant has conveyed to Hays Run Associates, a Pennsylvania limited partnership, a one-half interest in approximately 500 acres of the proposed borough. There was undisputed testimony that a landfill is proposed to be constructed on 400 acres of the 500 acre site. N.T., Feb. 17, 1988, at 60-61; see section A, committee findings of fact nos. 5 and 14. In addition, Hays Run Associates has an interest

in approximately twenty acres of the proposed borough which are not part of the 500 acre tract discussed above. N.T., Feb. 17, 1988, at 61. The site of the twenty additional acres has been condemned by Berks County for the purpose of constructing a trash to steam plant. Id; section A, committee findings of fact no. 5. The landfill has a projected handling capacity of 5,000 tons per day, while the trash to steam plant has a projected capacity of 1,000 tons per day. By virtue of section 1301 of the Municipal Waste Planning, Recycling and Waste Reduction Act,[3] the new borough would, apparently, be entitled to substantial host community fees.[4] However, those possible fees were not included in the projected revenue of the borough for its first five years of operation. N.T., Dec. 15, 1987, 7:00 P.M. hearing, at 40-41; section D, committee findings of fact no. 13.

Aside from the landfill and trash to steam plant, Carr proposes to develop the new borough with a Victorian village, planned residential developments, a cultural center, a mixed use

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[3]Act of July 28, 1988, P.L. ___, Act No. 1988-101, 53 P.S. §4000.1301 (Purdon's Pennsylvania Legislative Service, October 1988).

[4]Section 1301(b) of the Municipal Waste Act, 53 P.S. §4000.1301(b), provides that the host municipality benefits fee os $1.00 per ton of weighted solid waste is $1.00 per 3 cubic yards of volume-measured waste.

center, commercial areas, agricultural areas and open space areas. The Victorian village would include a 1,000 room hotel and 18 hole golf course, and would operate year round. The number of visitors per day was estimated at 25,000. Automobiles would not be permitted in the Victorian village; instead, transportation would be by horse, horse drawn vehicle and a rail system comprised of trolleys and steam driven trains. Borough of New Morgan Report by John Rahenkamp Consultants, Inc., Ch. 2, at 7.

As noted above, the trial court adopted and incorporated the majority's report. The trial court determined that the requirements of section 202 of the Borough Code had been met. Accordingly, pursuant to section 202(d) of the Borough Code, the trial court ordered the Berks County Board of Elections to conduct a referendum vote of the residents of the proposed borough. Nine residents voted in favor of incorporation, with one resident opposed to incorporation. On May 10. 1988, the trial court issued a final decision granting the petition for incorporation of the Borough of New Morgan. Appellants have appealed to this court.

Appellants have raised a total of eight issues. All Appellants argue that: 1) section 202 of the Borough Code is unconstitutional;

and 2) the trial court decision should be set aside because two committee members were biased. In addition, the Townships argue that: 3) a limited partnership does not have capacity as a freeholder to petition for incorporation of a borough; 4) the Borough Code does not permit incorporation of an area of a township which has no freeholders; 5) Applicant failed to meet its burden of proof; 6) the trial court erred in failing to hold a hearing; and 7) the trial court erred in restricting the evidence required to be produced before the committee. Finally, Intervenors argue that: 8) Applicant's sole motivation in seeking incorporation was circumvention of local zoning laws and, therefore, the petition should have been denied. We shall address these issues in order (5). Our scope of review is limited to determining whether the trial court abused its discretion. Borough of Bridgewater Petition, 87 Pa. Commonwealth Ct. 599,488 A.2d 374 (1985).

Appellant's constitutional argument is threefold. Appellants first argue that section 202 of the Borough Code is unconstitutional because it impermissibly impinges on the right to vote. Appellants argue that because only freeholders can petition the court of common pleas for incorporation of a borough, property ownership

is somehow a prerequisite to the right to vote. We do not propose to treat Appellants' argument lightly, but we fail to see a constitutional voting issue in this case. Section 202 flatly states that all residents of the proposed borough are eligible to vote after a petition for incorporation has been filed with the court of common pleas.[5] Property ownership is indeed a prerequisite to petitioning the court of common pleas. However, the only restriction on voting is based on residency. Accordingly, section 202 does not require property ownership as precondition to voting and, therefore, does not unconstitutionally infringe on the right to vote.

Appellants next argue that section 202 is unconstitutional because it undercuts the people's right to self determination as set forth in Article I, section 2 of the Pennsylvania Constitution. Appellants argue that section 202 infringes the right of the people to alter, reform or abolish their government. Appellants' argument is based on the fact that the residents of the Townships are not entitled to vote on the incorporation of the new borough. Appellants content that section 202 permits the alteration of the

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[5]We have reviewed the two United States Supreme Court cases cited by counsel at oral argument. Both cases, Hill v. Stone, 421 U.S. 289 (1975) and City of Phoenix v. Kolodziejski, 39 U.S. 204 (1970), involve situations where property ownership was a prerequisite to voting, not petitioning a court.

government of the Townships without the consent of those governments, i.e., the people of the Townships. However, section 202 does not authorize an alteration of government without the consent of the people. Instead, section 202 provides for creation of a government, subject to the will of the people.

Finally, Appellants contend that section 202 violates the constitutional requirement, found in Pa. Const. Art. IX, §8, that there shall be "uniform legislation establishing the procedure for consolidation, merger or change of the boundaries of municipalities." We squarely addressed this issue in our unanimous en banc decision in Bear Creek Township v. Penn Lake Park 20 Pa. Commonwealth Ct. 77, 340 A.2d 642 (1975). In Bear Creek, we stated that "if the Legislature had intended to include incorporation of a borough within this restriction, it could have done so by including the word 'incorporate' along with 'consolidate, merge and change boundaries. '" Id. at 79, 340 A.2d at 634. Accordingly, we held that the provisions of Art. IX, §8 do not apply to the incorporation of a borough. We decline the invitation to review and/or reverse our holding in Bear Creek.

Appellants' second argument concerns the alleged bias of two

of the members of the five person committee. Appellants point to certain testimony before the committee which indicates that the two committee members from the proposed borough (for purposes of this discussion, referred to as the New Morgan members) stated to another person, sometime in December,[6] that they were in favor of the proposed borough and intended to vote for it. In addition, Appellants point out that one of the New Morgan members is employed full-time by Applicant, and that both of the New Morgan members are tenants of Applicant. Appellants contend that these factors require that the votes of the two New Morgan members be stricken. After careful review, we decline to do so.

After the close of the hearings before the committee, Intervenors filed a motion to disqualify the two New Morgan members and the chairman of the committee.[7] The transcript of the hearing held before the trial court, on March 25, 1988 (which is also the date the motion to disqualify was filed), demonstrates that

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[6]The hearings were held throughout the period of December 9, 1987-February 24,1988.

[7]Intervenors have not pursued their request to disqualify with respect to the chairman.

the trial court was well aware of the allegations of bias. On April 4, 1988, the trial court denied the motion to disqualify. The motion was denied without comment, and the alleged bias is not discussed in the trial court's opinion. We are loath to reverse the trial court in this situation. Given the particular circumstances of this case, and reviewing the issue in light of the provisions of the Borough Code, we decline to disqualify the votes of the two New Morgan members.

The next issue, raised by the Townships, is whether a limited partnership such as Applicant has capacity as a freeholder to petition for incorporation of a borough. In Canterbury Village, Inc. Appeal, 75 Pa. Commonwealth Ct. 334, 462 A.2d 865 (1983), we held that there is nothing in the Borough Code to prevent a sole corporate freeholder from petitioning for incorporation of a borough. Although the Townships point out various distinctions between the legal status of corporations and limited partnerships, we see no compelling reasons for treating the two entities differently for purposes of petitioning for the incorporation of a borough.

The Townships next argue that the Borough Code does not permit incorporation of an area of a township which has no

freeholders. Although we certainly agree with the Townships' proposition, we cannot agree with their theory, which is as follows. Applicant's office is located in the portion of the proposed borough set in Caernarvon Township. Accordingly, the office is not located in the portion of the proposed borough set in Robeson Township. Thus, the Townships argue, Applicant cannot be a resident freeholder in Robeson Township. In fact, however, it is undisputed that Applicant is the sole freeholder of the entire tract. In addition, Applicant is a resident of the tract. The fact that Applicant's offices are located in the portion of the proposed borough in Caernarvon Township is of no import for purposes of the Borough Code. See Canterbury Village Appeal.

We turn now to the issue of whether Applicant failed to meet its burden of proof. As noted above, section 202(c) lists three specific factors upon which the committee is to render expert advice and findings of fact. Briefly, the three specific factors are: 1) the proposed borough's ability to obtain or provide adequate and reasonable support services, 2) the existing and potential development of the borough, including commercial, industrial and residential development; and 3) the financial or tax effect on the

proposed borough and existing governmental units (in this case, the Townships). These factors were added to section 202, in 1981, by the Act of July 10, 1981, P.L. 247.

In Bridgewater, we considered the legislature's addition of the three factors, and concluded that the amendment to a large extent incorporated three guidelines adopted by this court in Bear Creek.[8] The Bear Creek guidelines, as presented in Bridgewater, 87 Pa. Commonwealth Ct. at 602 n.4, 488 A.2d at 375 n.4, are as follows:

> (1) Whether the area proposed for incorporation is one harmonious whole with common interests and problems which can be properly served by borough government;
>
> (2) Whether public services such as police, fire protection, water and sewage disposal are to be provided by borough government; and
>
> (3) Whether the incorporation disadvantages the remaining township.

Accordingly, the requirements for the grant of a petition for incorporation of a borough are relatively well established. The legislature has mandated that three factors be considered, and Bear Creek and Bridgewater require consideration of whether the

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[8]See also Two Ponds, Inc. Appeal, 87 PA. Commonwealth Ct. 324, 329, 489 A.2d 939, 941 (1985) (The conditions in section 202(c) "may be compared with the three court-made factors..."

proposed borough is a harmonious whole with common interests and problems which can be properly served by borough government.

Before addressing whether Applicant met its burden of establishing the prerequisites for incorporation of a borough, we shall here address Intervenors argument that the motivation of the Applicant in seeking incorporation of a borough is a factor which must be considered. Intervenors argument is based largely on our decision in Bridgewater. In Bridgewater, we affirmed the trial court's denial of a petition to incorporate. Although the opinion discusses many of the judicial and legislative guidelines for the incorporation of a borough, Intervenors focus on the following statement in the opinion: "The trial court found that the motivation for the proposed Borough was to segregate it from the rest of the Township." Bridgewater, 87 Pa. Commonwealth Ct. at 604-05, 488 A.2d at 376.

Based on our reference to motivation in Bridgewater, Intervenors content that motivation is a separate factor which must be considered by the committee and the trial court. Although we are not prepared to hold that motivation is always a crucial factor in borough incorporation cases, we agree with Intervenors that

motivation is an important aspect of this case.[9] Accordingly, we shall address the question of motivation in our discussion of whether Applicant has established the requirements for incorporation of a borough, i.e., whether Applicant has met its burden of proof.

The Townships assert 1) that the proposed borough is not a harmonious whole and 2) that the disadvantages of incorporation to the Townships are substantial and militate against creation of a new borough. With regard to whether the borough is a harmonious whole, the Townships assert that the only borough projects which are in progress are for the landfill and the trash to steam plant, that these waste disposal systems are not in harmony with the remainder of the proposed borough, that the majority of the tract is presently unsettled,[10] and that the proposed resort, village, and other

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[9]In Two Ponds, we noted that the trial court had dismissed a petition for incorporation on the ground that the incorporation would disadvantage the remainder of the township by subverting the existing zoning and planning codes. In Two Ponds, however, the trial court had not appointed a Borough Advisory Committee. Accordingly, we remanded the case for the proceedings required by section 202 of the Borough Code.

[10]We note that section 206 of the Borough Code authorizes the trial court to exclude from the proposed borough "large and unsettled lands" if it deems that such land does not properly belong to the proposed borough. The trial court did not exclude any lands from the proposed borough. Although the Townships make an argument that parts of the Townships should have been excluded from the proposed borough, we do not agree. Applicant's proposed development includes plans to make use of nearly every yard of its property. Thus, it does not seek to seize unsettled land from the Townships merely to establish such land as part of the new

development is merely a vision and pipe dream of Carr.[11] We have exhaustively reviewed the record in this case, and we are unable to conclude that the trial court erred in finding that the proposed borough is a harmonious whole. Applicant presented numerous exhibits, including detailed maps of the proposed borough, geological reports, water testing reports, and a comprehensive report detailing the development of the borough. This evidence, combined with Carr's testimony, supports a finding that the proposed borough would be one harmonious whole.

The Townships next argue that they will be substantially disadvantaged by incorporation of the proposed borough. Caernarvon Township would lose $9,917.00 per year in taxes, $9,084 of that amount resulting from lost real estate taxes. This amount represents 3.2% of Caernarvon Township's general fund. Robeson Township would lose 1,265.00 per year in taxes. Many of the proposed borough's boundaries are Township roads. The proposed borough would be serviced by these roads, but the Townships would continue to be responsible for their maintenance. In addition, as

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borough.

[11]As noted earlier, Carr is the president of Culbertson Lakes, Inc., the general partner of Applicant.

noted earlier, if the borough is created, it, rather than Caernarvon Township, will receive any host community fees generated by the landfill and the trash to steam plant.

However, the committee found that there would also be advantages to the Townships if the borough were created. The development of the borough would generate revenue because development of adjoining land would escalate. The borough would generate outside revenue which would offset any loss of tax revenue. In addition, the development of the borough is expected to result in the creation of a substantial number of jobs. Also, the Townships would have to substantially expand their municipal services in order to provide for residents of and visitors to the development if it were not incorporated as a borough. We have carefully reviewed the record, and we cannot conclude that the trial court abused its discretion in grating the petition for incorporation.

We turn now to the issue of motivation, as discussed above. With regard to motivation, the committee stated: "Applicant is basically motivated by a desire to establish an independent governmental agency which will compliment [sic] the conceptual theme of a cohesive combination of related but unique land and

development uses unfettered by unreasonable governmental restraints." The committee also found that the present zoning is not adequate for the projected community. In addition, the committee noted that the borough would be subject to no zoning ordinance until such time as it chose to enact one, inasmuch as Berks County does not have a zoning ordinance. However, Berks County does have land use regulations, and can enforce those regulations in the absence of a local ordinance.

We do not doubt that Applicant is motivated in part by a desire to escape certain governmental controls.[12] However, that desire is not necessarily contrary to the Borough Code, nor is it the sole motivating factor. Carr testified that financial backing is contingent, to some extent, on the degree of control held by the developer. In addition, the borough is located in two townships. As such, coordination of local zoning ordinance would be required. Under these circumstances, the trial court did not abuse its discretion in granting incorporation.

The Townships next argue that the trial court erred in failing

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[12]Applicant has met with public opposition to the plans for a landfill and trash to steam plant. In addition, plans to hold some sort of rock concert or musical festival on the site were canceled, apparently because of public opposition to the event.

to hold a hearing. We note that the trial court did hold a hearing on March 25, 1988, although no witnesses were presented and it seems the only evidence accepted by the trial court was the record created before the committee. The trial court's refusal to hear further testimony was a decision within its sound discretion and, given the voluminous record created before the committee, there was no abuse of discretion.

Finally, the Townships argue that the trial court erred in restricting the evidence required to be produced before the committee. The Townships requested production of various legal documents regarding Applicant, Hays Run Associates, and a landfill developing company. The requested documents were eventually produced, pursuant to a court order, with all financial information and references deleted. The Townships were unable to elicit from witnesses certain information they sought with regard to the documents. The Townships sought to prove, via the various documents and witnesses, that the motivation of the Applicant was to circumvent existing zoning and planning regulations of Caernarvon Township.

Review of the record establishes that the issue of Applicant's

motivation was squarely addressed on numerous occasions. Applicant's witnesses, most notably Carr, were exhaustively cross-examined by counsel for Robeson Township, counsel for Caernarvon Township and counsel for Intervenors. The trial court did not err in refusing to allow further evidence on this issue.

Affirmed.

MADALINE PALLADINO, JUDGE

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
KATHLEEN HOOD, et al. and HARRY J. SMITH, et al., Appellants	:	NO. 1343 C.D. 1988

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
ROBESON TOWNSHIP, BERKS COUNTY PENNSYLVANIA Appellant	:	NO. 1344 C.D. 1988

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	:	IN THE COMMONWEALTH COURT OF PENNSYLVANIA
CAERNARVON TOWNSHIP, BERKS COUNTY PENNSYLVANIA Appellant	:	NO. 1345 C.D. 1988

ORDER

AND NOW, July 17, 1989, the decision of the Court of Common Pleas of Berks County in the above-captioned matter is affirmed.

MADALINE PALLADINO, JUDGE

DISSENTING OPINION
BY JUDGE BARRY

FILED: July 17, 1989

I must respectfully dissent to the majority opinion.

The motivation for the incorporation of the Borough of New Morgan, as acknowledged by the court-appointed Borough Advisory Committee and the majority opinion here, was to bypass the zoning and land development restrictions of Robeson and Caernarvon Townships on the uses sought to be developed by Morgantown Properties, i.e., a landfill and trash to steam plant. We agree with the majority that we cannot rely on Two Ponds, Inc. Appeal, 87 Pa. Commonwealth Ct. 324, 489 A.2d 939 (1985), to dispose of this question inasmuch as the Court decided that case on a different issue. I would find, however, that the case now before us provides an appropriate vehicle by which to affirmatively state that the type of subversion of zoning and land use planning present in this case is not an appropriate motivation for the incorporation of a borough. I simply do not believe that the intent of the legislature in enacting the incorporation provisions of The Borough Code encompassed a scheme such as that proposed here. I would conclude, then, that the trial court

abused its discretion in granting this incorporation petition. See Canterbury Village, Inc. Appeal (In Re: Incorporation of Borough of Seven Fields), 75 Pa. Commonwealth Ct. 334, 342, 462 A.2d 865, 870 (1983), where this Court found an abuse of discretion, reversed a trial court and concluded:

> True, the question of whether or not to grant a petition for borough incorporation is addressed mainly to the discretion of the trial court. Yet, it is not beyond our scope of appellate review to decide whether the trial court has committed an abuse of discretion. Whitehall Borough Incorporation Case, 358 Pa. 90, 55 A.2d 746 (1947).

Further, the trial court denied a motion to disqualify two members of the court-appointed Borough Advisory Committee which was based on allegations of bias. As stated in the majority opinion, two so-called New Morgan committee members stated before the hearings were concluded that they intended to vote for it. Further, one of the members is employed full time by applicant, and both of the New Morgan committee members are tenants of applicant. I believe the trial court should have made findings of fact on the issue of bias. The absence of such findings renders the trial court's order and opinion incapable of meaningful appellate review. Accordingly, with respect to this

issue I would remand the case for the purpose of having the trial court comply with the provisions of Pa. R. A. P. 1925(a). Michaels Development Co., Inc. v. Benzinger Township Board of Supervisors, 46 Pa. Commonwealth Ct. 337, 407 A.2d 895 (1979).

In conclusion I dissent to the majority opinion on two alternative grounds. First and foremost I believe a reversal is in order based on the issue of motivation. Second, I believe the case should, at least, be remanded for findings of fact on the issue of bias.

FRANCIS A. BARRY, Judge

IN RE:	: IN THE COURT OF
INCORPORATION OF	: COMMON PLEAS OF
BOROUGH OF NEW	: OF BERKS COUNTY,
MORGAN	: PENNSYLVANIA
	: No. 193 Misc. Docket 1987

FINAL DECREE

AND NOW, TO-WIT, this 10 day of May, 1988,

This Court having considered the Petition for Incorporation filed by Morgantown Properties, all other pleadings and the report and advice of the Borough Advisory Committee; and,

Following such consideration, this Court having ordered on March 30, 1988 that the Berks county Board of Elections conduct a referendum vote in accordance with the Borough Code, 53 P.S. §45202, on whether the Borough of New Morgan should be incorporated; and

This Court having now received the certified election results of that referendum vote held on April 26, 1988; the results of the vote being, nine in favor of incorporation and one against incorporation.

It is hereby ORDERED, ADJUDGED and DECREED,

1. That in accordance with the provisions of the Borough

Code, 53 P.S. §45202, the Petition for Incorporation of Borough of New Morgan is hereby GRANTED.

2. That this decree shall constitute the charter of the Borough of New Morgan.

3. That the corporate name of the Borough shall be "The Borough of New Morgan."

4. That the boundaries of the Borough shall be as specifically described in Exhibit A which is attached to this Final Decree and as shown on the plot attached to the Petition for Incorporation as Exhibit A thereto.

BY THE COURT:

_____

Thomas J. Eshelman, Jr.

IN RE: INCORPORATION OF BOROUGH OF NEW MORGAN	: IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA
	: No. 193 Miscellaneous Dkt. 1987

OPINION, ESHELMAN, THOMAS J., J., September 22, 1988

This opinion was necessitated by appeals taken from our order to grant the petition of Incorporation of the Borough of New Morgan.

On August 11, 1987, Morgantown Properties filed a Petition for Incorporation (hereinafter referred to as the "Petition") under provision of the Borough Code 53 P.S. §45201, requesting that a certain tract of land situate partially in Caernarvon Township and partially in Robeson Township, Berks County, Pennsylvania, be incorporated as a borough to be named "the Borough of New Morgan."

Pursuant to the Petition and the Borough Code 53 P.S. §45202(b), this court appointed a Borough Advisory Committee

(hereinafter the "Committee"), consisting of two residents of the proposed borough, one resident of Caernarvon Township, one resident of Robeson Township, and a fifth member who did not reside in either township or in the area proposed to be incorporated. In addition, the court ordered that the director of the Berks County Planning Commission act as an advisor to the Committee.

The Committee held hearings for a total of 101.5 hours. At the hearings testimony was presented, under oath, on behalf of Morgantown Properties, Caernarvon Township, Robeson Township, the intervenors, and the public. A total of sixty-seven (67) exhibits were marked, considered by the Committee, and entered into the record by stipulation of all the parties.

The Borough Code, at 53 P.S. §45202 (c), requires the Committee to "advise the Court in relation to the establishment of the proposed Borough," and further to "render expert advice and Findings of Fact relating to the desirability of such incorporation."

The Committee split 3-2 on the issue of whether to incorporate New Morgan and submitted both a majority and a

minority report with the majority being in favor of granting incorporation. The majority's report was very thorough and well thought out. This court adopts and incorporates herein the Committee's majority report, including its Findings of Fact and advice.

Following consideration of the Committee's report and advice, and finding that the conditions prescribed by 53 P.S. §45202 have been complied with, on March 30, 1988, this court ordered that the Berks County Board of Elections conduct a referendum vote in accordance with the Borough Code, 53 P.S. §45202, on whether the Borough of New Morgan should be incorporated.

A referendum vote was held on April 26, 1988. The certified election results were nine (9) in favor of incorporation, and one (1) against incorporation. Having received the certified results of the vote, this court on May 10, 1988, issued a final decree in accordance with the Borough Code 53 P.S. §45202 granting the Petition for Incorporation of the Borough of New Morgan.

The Committee was required by the Borough Code 53 P.S.

§45202 (c) (1), (c) (2), (c) (3) to consider the following:

A. The proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection, and other appropriate facility services;

B. The existing and potential commercial, residential and industrial development of the proposed borough; and

C. The financial or tax effect on the proposed borough and existing governmental unit or units.

In addition to the factors enumerated in Section 45202, the appellate courts have determined that Section 45202, as amended, to a large extent incorporates the previously court-made guidelines to be considered in determining the desirability of incorporation.

In Re Incorporation of the Borough of Bridgewater, 87 Pa. Commw. 599, 488 A.2d 374 (1985).

The factors to be considered in granting or denying a petition for incorporation were set forth in Bear Creek Township v. Borough of Penn Lake Park, 20 Pa. Commw. 77, 340 A.2d 642

(1975). They are:

a) whether the area proposed for incorporation is one harmonious whole with common interests and problems which can be properly served by borough government;

b) whether public services such as police, fire protection, water and sewage disposal are to be provided by the borough government; and

c) whether the incorporation disadvantages the remaining townships.

In addition, the Commitee also considered the motive of the petitioner in seeking incorporation. The Committee has considered all the factors required by the Code and the case law, and the majority found that they have been satisfied. This court is in agreement.

A review of the record reveals that petitioner has fully complied with all of the procedural requirements of the Code. Once the requirements of the Act have been met, the burden of proof is then on the opponents to show compelling reasons why the incorporation should not be had.

The opponents of incorporation have not submitted any legally sufficient reasons to refuse incorporation. The minority report made some vague arguments about possible traffic problems which certainly were not compelling, and intervenors made a weak constitutional argument challenging the Borough Code, which was similarly without merit. The court in In Re Incorporation of Green Hills Borough, 59 Wash. County Reports 75, 83 (1978) stated:

1) if the requirements of the Act are met, the court may direct the incorporation;
2) it then becomes the burden of the opponents to show reasons why the incorporation should not be had; and
3) failing these, the court should favor the incorporation if any decent reasons stand unrefuted.

Petitioners have presented evidence that the proposed Borough of New Morgan is a harmonious whole which contains a unique community of interest, and its full development will only be accomplished through incorporation. The facts of this matter can best be summarized by the court's opinion in In Re

Incorporation of the Borough of Juniata Terrace, 2 Mifflin County Law Journal 70, 80 (1965). The court stated:

> "We are satisfied that substantial benefits will result to the residents by the formation of a borough. Their needs have coalesced them into a single compact community. There exists a homogeneity and a community of governmental interest. The regulatory services required by them are best obtainable through incorporation. The petition meets all of the statutory requirements and, accordingly, should be allowed."

The Committee has made all of the findings that are required by the Act that would support the Petition and which would warrant the granting of the Petition. For all of the reasons discussed above, and upon the recommendation of the Committee, this court finds that the Petition for Incorporation of the Borough of New Morgan should be granted.

BY THE COURT:

_____

THOMAS J. ESHELMAN, J.

IN THE COURT OF COMMON PLEAS OF BERKS COUNTY, PENNSYLVANIA

IN RE:	:	
	:	
INCORPORATION OF	:	
BOROUGH OF NEW	:	
MORGAN	:	NO. 193 Misc. Docket 1987

PETITION FOR LEAVE TO INTERVENE AND EXCEPTIONS TO PETITION TO INCORPORATE THE BOROUGH OF NEW MORGAN

TO: THE HONORABLE, THE PRESIDENT JUDGE OF THE SAID COURT:

1. Respondents excepting to the instant Petition are voters and freeholders of Robeson Township and Caernarvon Township, the municipalities, portion of which are encompassed by said Petition. Their names and addresses are as follows:

Kathleen Hood, Robeson Township
Box 210 R.D. #2, Morgantown, PA 19543

Frank A. Pavlesich, Robeson Township
R.D. #2 Box 166, Morgantown, PA 19543

Jeanne M. Pavlesich, Robeson Township
R.D. #2 Box 166, Morgantown, PA 19543

David L. Sparr, Robeson Township
R.D. #2, Morgantown, PA 19543

Jeanette Sparr, Robeson Township

R.D. #2, Morgantown, PA 19543

Victor D. Dodd, Robeson Township
R.D. #1 Box 320A, Birdsboro, PA 19508

Patricia J. Dodd, Robeson Township
R.D. #1 Box 320A, Birdsboro, PA 19508

Karen M. Bergey, Caernarvon Township
R.D. #1 California Road, Morgantown, PA 19543

Gary D. Bergey, Caernarvon Township
R.D. #1 California Road, Morgantown, PA 19543

2DRobert Hopkins and Shirley E. Hopkins, Caernarvon Township
Box 147 R.D. #3, Elverson, PA 19520

Harry J. Smith, Caernarvon Township
R.D. #3 Box 74, Elverson, PA 19520

Judith A. Smith, Caernarvon Township
R.D. #3 Box 74, Elverson, PA 19520

See attached Exhibit "A" incorporated herein by reference.

2. Respondents object to the grant of the instant Petition because the Petition is a thinly disguised attempt to circumvent the zoning laws of the affected municipalities in order to build a mass-burn trash incinerator and develop landfills and allied trash systems upon the subject land.

3. On 18 November 1986 after months of hearings, the Zoning Hearing Board of Caernarvon Township issued an Order

voiding a permit which had been issued to Morgantown Properties to build a mass-burn trash incinerator.

4. Morgantown Properties filed a Notice of Appeal from the aforesaid Order with this Court as of No. 263 December, 1986.

5. Certain of the Respondents herein petitioned for leave to intervene in the zoning appeal; Morgantown Properties answered with objections to the intervention and has taken no steps to advance the zoning appeal since April of 1987.

6. The Petition is defective in that it fails to bear the signature of a majority of the freeholders and/or voters and/or residents living within the proposed borough.

7. The Petition is defective in that it fails to bear the signature of a majority of the freeholders and/or voters and/or residents living within each of the separate portions of the proposed borough located in each of the two affected municipalities.

8. If "freeholder" is interpreted to mean "landowner," then the Act of July 10, P.L. 247, 53 P.S. 45201 et seq., is unconstitutional and the Act is void and of no effect.

9. Granting the Petition will substantially change the nature, character and quality of life of the affected municipalities to the serious detriment of their residents.

10. Granting the petition will put burdensome and onerous demands upon the natural resources, roadways and other facilities including, but not limited to, schools of the affected municipalities, to the serious detriment of their residents.

11. The petition's proposals are ephemeral with no guarantees that they will be carried out.

12. Petitioner seeks to establish a fiefdom free of zoning and other controls now existing in the affected municipalities, dedicated to the pursuit of profit and bearing no reasonable relationship to the needs of residents in the affected municipalities nor to the general welfare and planning and comprehensive zoning scheme of the area.

13. The proposed borough does not possess the necessary prerequisites for self-government.

14. The proposed borough is sought so as to avoid the payment of wage taxes, business taxes, real estate taxes and other appropriately imposed taxes to the affected municipalities and

will financially damage said municipalities.

15. The proposed borough is not a harmonious whole with common interests and problems best served by borough government. On the contrary, it will drive a wedge between the affected municipalities and harm them.

16. The motivation for the Petition is to segregate the proposed borough from the affected municipalities to their detriment

17. The proposed borough will deprive the affected municipalities of the support and balance which is essential to preserve and develop said municipalities in an orderly way accommodating varied interests, populations and uses.

18. The Petition is premature in that it is based on prospective rather than existing uses and conditions which would provide the Court with a basis upon which to form a judgment.

19. Granting the Petition will not serve the highest interests of all concerned.

20. Respondents reserve the right to submit additional reasons for denial of the Petition as the evidence develops.

WHEREFORE, Respondents pray that your Honorable

Court will permit them to intervene and deny the Petition.

NORMAN ASHTON KLINGER
& ASSOCIATES, P.C.

BY:_____

Norman Ashton Klinger 10198
Attorney for Petitioners
612 Swede Street
Norristown, PA 19401
(215) 275-1112

AFFIDAVIT

COMMONWEALTH OF :
PENNSYLVANIA :
:SS
COUNTY OF :
CHESTER :

Before me, the undersigned authority, personally appeared Raymond Carr, who first being duly sworn according to law doth depose and say that he is President of Culbertson Lakes, Inc., the General partner of Morgantown Properties, a Pennsylvania limited partnership, and that he is authorized to act for said corporation and that the following statements are true and correct to the best of his knowledge, information and belief and may be relied upon by the Berks County, Pennsylvania, Board of Elections:

A. That attached hereto, marked Exhibit "A" and made a part hereof is a list of all current residents (whose mailing address is R.D. #1, Morgantown, PA 19543) of that portion of Caernarvon Township, Berks County, Pennsylvania, proposed to be incorporated into the Borough of New Morgan in the proceeding filed in the Court of Common Pleas of Berks County,

Pennsylvania, styled to 193 Misc. Docket 1987, and

B. That there are no residents of that portion of Robeson Township, Berks County, Pennsylvania, proposed to be incorporated into the aforesaid Borough of New Morgan.

Raymond H. Carr

SWORN TO AND SUBSCRIBED before me this 6th day of April, 1988.

SALLY LYNCH, NOTARY PUBLIC
UWCHLAN TOWNSHIP, CHESTER COUNTY
MY COMMISSION EXPIRES APRIL 22, 1991

EXHIBIT "A"

The following is a list of all current residents of that portion of Caernarvon Township, Berks County, Pennsylvania, proposed to be incorporated into the Borough of New Morgan.

Judith W. Buhl-Betz
William J. Betz
Benjamin W. Buhl
Melissa J. Buhl
Robert G. Williams
Patricia A. Williams
Walter Segner
Diane G. Bramhall
Courtney Bramhall
Justin Bramhall
Warren E. Waltman
Betty Waltman
Richard Waltman
Ronald Waltman
Harry T. Sotzin, Jr.
Betty J. Sotzin
Eric Sotzin

Raymond H. Carr

MICHAEL F. FEENEY
ANTHONY J. CARABELLO

T. ROSE BIXLER
CHIEF REGISTRAR

OFFICE OF

REGISTRATION COMMISSION
BERKS COUNTY, PA
COURTHOUSE, READING, PENNSYLVANIA 19601

Phone - 378-8282

The Following are registered electors in CAERNARVON TOWNSHIP

Judith W. Buhl-Betz
William J. Betz
Benjamin W. Buhl
Melissa J. Buhl
Robert G. Williams
Patricia A. Williams
Diane G. Bramhall
Warren E. Waltman
Richard Waltman
Harry T. Sotzin, Jr.
Betty J. Sotzin

SWORN TO AND SUBSCRIBED by me this 12th day of April, 1988.

T. Rose Bixler

Chief Registrar

Supreme Court, U.S.
FILED
AUG 13 1991
OFFICE OF THE CLERK

(2)

No. 91-92

In The

Supreme Court of the United States

October Term, 1991

CAERNARVON TOWNSHIP, et al.,

Petitioners,

v.

MORGANTOWN PROPERTIES,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD DISALLE
*ROGER CURRAN
STEVEN PETRIKIS

ROSE, SCHMIDT, HASLEY & DISALLE
900 Oliver Building
Pittsburgh, PA 15222-5369
(412) 434-8600

Attorneys for Respondent

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Have Petitioners raised any issue of federal law so special and important as to warrant review via certiorari jurisdiction?

2. Do Petitioners, who are neither residents of nor owners of land within a proposed borough, have standing to attack the constitutionality of a statute of the Commonwealth of Pennsylvania on the basis that it authorizes resident landowners, but not residents who do not own land, to initiate the borough incorporation process by the filing of a petition?

3. Assuming that Petitioners have standing to raise the issue, does Pennsylvania's procedure for incorporation of boroughs establish an unconstitutional prerequisite to participation in the political or electoral process when nonlandowning residents of the proposed borough, who, although unable to initiate the incorporation process, are permitted to, and, in this case, did serve on the Borough Advisory Committee, did participate in months of hearings regarding the question of incorporation, and did vote on the question of incorporation?

4. Where the Petition for Writ of Certiorari refers only to an unspecified and vague constitutional challenge raised by Petitioners in the court of first instance, have Petitioners preserved the right to argue the equal protection violations they now assert before this Court?

5. Assuming that the issue has been preserved, does a statute which grants the right to vote on the question of borough incorporation to all residents of a proposed borough who will be subject to the borough government, but

COUNTERSTATEMENT OF QUESTIONS PRESENTED – Continued

not to those residing outside the borough (but within existing governmental units from which the new borough will be carved), violate the equal protection clause?

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STATUTORY PROVISIONS INVOLVED

Petitioners quote only a small portion of the Pennsylvania Borough Code's process for incorporation of a borough. Section 202 of the Borough Code, 53 P.S. § 45202, as amended in 1981, is set forth in its entirety below:

§ 45202. Applications for incorporation

(a) The application for incorporation shall be by a petition signed by a majority of the freeholders residing within the limits of the proposed borough, when all parts of the proposed borough are in the same township, and, where portions of the proposed borough are in different townships, the petition shall be signed by a majority of the freeholders residing in each of such separate portions. The signatures must be secured within three months immediately preceding the presentation thereof to the court. Such petition shall be subscribed by and sworn to by at least one of the signers. The number of signers required to the petition shall be ascertained as of the date the petition was presented to court.

(b) The court shall establish a Borough Advisory Committee which shall consist of two residents of the proposed borough, two residents of the existing governmental unit or units recommended by the respective governing body of the unit or units and not residing within the proposed borough and one resident of the county not residing in either area who shall serve as the chairman of the committee. Such a committee shall be established when a petition is received by the court for the creation of a borough. Pursuant to this act, the members of such committee shall be appointed by and shall serve at the pleasure of the court. The members shall serve without salary, but the court may

entitle each such member to reimbursement for his actual and necessary expenses incurred in the performance of his official duties. The director of the County Planning Commission shall serve as advisor to the committee.

(c) Such committee shall, within sixty days of its creation, advise the court in relation to the establishment of the proposed borough. In particular, the committee shall render expert advice and findings of fact relating to the desirability of such an incorporation, including, but not limited to, advice as to:

(1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;

(2) the existing and potential commercial, residential and industrial development of the proposed borough; and

(3) the financial or tax effect on the proposed borough and existing governmental unit or units.

(d) The Court, if it shall find, after hearing and advice of the committee, that the conditions prescribed by this section have been complied with, shall certify the question to the board of elections of the county for a referendum vote of the residents of the proposed borough. Upon receipt of the certified election results, the court shall enter a final decree granting or denying the prayer of the petitioners.

COUNTERSTATEMENT OF THE CASE

The Process of Incorporation Under Pennsylvania's Borough Code

Pursuant to the Commonwealth of Pennsylvania's statutory procedure for the incorporation of boroughs ("Borough Code," 53 P.S. § 45201 *et seq.*), as amended by its legislature in 1981, Morgantown Properties ("Morgantown") filed a Petition for Incorporation ("Petition") with the Court of Common Pleas of Berks County on August 11, 1987. The Borough Code provides for the initiation of the lengthy incorporation process by a majority of resident freeholders[1] of the proposed borough.[2] Their role,

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[1] For purposes of this Brief, the words "freeholder" and "landowner" are synonymous.

[2] The proposed new borough, the Borough of New Morgan, is comprised of approximately 3,671 acres of land, 2,394 of which are situate in Caernarvon Township and 1,277 of which are located in Robeson Township (App. 26a). Robeson Township is not a party to the Petition for Writ of Certiorari. Morgantown proposes an $800,000,000 development plan which will employ over 12,000 persons from which a permanent population of approximately 9,000 is expected to emerge (App. 10a-11a). Central to the plan is the development of a Victorian Village, a national tourist attraction with an estimated 25,000 visitors per day, which will include a 1,000-room hotel and an 18-hole golf course. In keeping with the Victorian concept, transportation throughout the village itself would be by horse-drawn vehicle, trolley and steam-driven trains only; automobiles would not be permitted. The Borough of New Morgan will also contain planned residential developments, a cultural center, a mixed use center, commercial and agricultural areas and open spaces (App. 27a-28a). As Petitioners choose to emphasize in their Petition for Writ of Certiorari, a landfill is also proposed. The total acreage allotted for the

(Continued on following page)

however, is only to suggest the boundaries of the new borough. Thereafter, the Borough Code calls for the common pleas court, a court of general jurisdiction within the county, to appoint a Borough Advisory Committee to hold hearings and make recommendations on the proposed incorporation. Ownership of real estate is *not* a prerequisite to membership on the Borough Advisory Committee. Following consideration of the recommendations of the borough Advisory Committee and after a hearing of its own, the court of common pleas, if it finds that all statutory standards for incorporation have been met, certifies the incorporation question to the board of elections of the county for a vote of all residents of the proposed borough, landowners and nonlandowners alike. Upon a favorable vote, the court of common pleas will enter a final decree incorporating the borough. 53 P.S. § 45202.

Pursuant to the Borough Code, the Petitioners herein, and others, filed exceptions to the Petition. 53 P.S. § 43204. Although the Petitioners have neglected to say so in their Petition for Writ of Certiorari, it is important to note that *none* of the individual Petitioners before this Court were or are either residents of or owners of land within the proposed new borough.

(Continued from previous page)

landfill project is 400 acres of the new borough, although the landfill itself will utilize only a portion of that tract. (App. 26a-27a.)

Proceedings of the Borough Advisory Committee

In accordance with section 202(b) of the Borough Code, Judge Thomas J. Eshelman, Jr. of the Court of Common Pleas of Berks County established a Borough Advisory Committee consisting of two residents of the proposed borough, a Supervisor of Caernarvon Township, a Supervisor of Robeson Township, and a fifth member who did not reside in either of the townships or the proposed borough (App. 3a, 4a). The two residents of the proposed borough who served on the Borough Advisory Committee did not own land within the proposed borough. Between the first part of December of 1987 and February of 1988, the Borough Advisory Committee held over fifteen days of hearings, during which more than one hundred hours of testimony was taken (App. 25a). A total of 67 exhibits were marked, considered by the Borough Advisory Committee and entered into the record (App. 50a). The Petitioners herein presented evidence and participated fully throughout the lengthy process. The Borough Advisory Committee voted three to two in favor of incorporation (the dissenters being the supervisors of Caernarvon and Robeson Townships), and the Court of Common Pleas of Berks County, after hearing, adopted the Committee's majority report as the court's Findings of Fact and Conclusions of Law.

Findings of the Borough Advisory Committee and the Court of Common Pleas

Pursuant to section 202(c) of the Borough Code, the Borough Advisory Committee and, in turn, the court of common pleas, were directed to consider a broad range of issues involving varying interests including:

> (1) the proposed borough's ability to obtain or provide adequate and reasonable community support services such as police protection, fire protection and other appropriate community facility services;
>
> (2) the existing and potential commercial, residential and industrial development of the proposed borough; and
>
> (3) the financial or tax effect on the proposed borough and existing governmental unit or units.

With respect to the balancing of the advantages and disadvantages of incorporation, the Borough Advisory Committee found that:

> 1. The large area to be developed which remains unsettled and with virtually no population lends itself to "self-styling"; and, therefore, would not disadvantage the remaining townships.
>
> 2. The existing municipalities, not having encouraged nor provided incentives to the applicant or previous owners to develop the area, would now welcome the new development and, therefore, not suffer any significant adverse effects.
>
> 3. The economics of all municipalities can only benefit from the development of the heretofore dormant tract . . . .

(App. 14a.) The court of common pleas, in adopting these findings, noted that this 3,700 acre tract had lain "virtually dormant and undeveloped for the past ten years." (R. 79a.)

The Electoral Process – Residents of Proposed Borough Approve Incorporation

Upon the recommendation of the Borough Advisory Committee, and having found that the conditions of section 202 had been complied with, on March 30, 1988, the court of common pleas certified the question of incorporation to the Board of Elections for Berks County for a vote of *all residents* of the proposed borough (whether landowners or not), again as required by the Borough Code. The results of the vote were overwhelmingly in favor of incorporation. Of the eleven registered voters, nine (9) voted in favor of incorporation and only one (1) vote was cast in opposition to incorporation. Accordingly, by Order dated May 10, 1988, the Petition for Incorporation of the Borough of New Morgan was granted. (App. 47a.)

Pennsylvania Appellate Courts Affirm Incorporation

Appeals followed by the petitioners to the Pennsylvania Commonwealth Court and then to the Pennsylvania Supreme Court. According to the Petition for Writ of Certiorari, the only pleading in which a constitutional issue, albeit a vague one, was raised in the court of first instance was the Petition for Leave to Intervene and Exceptions to the Petition for Incorporation.[3] There, the Petitioners alleged:

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[3] Rule 14.1(h) of the Supreme Court Rules requires the petitioner to "specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised." Petitioners' only attempt to comply with this rule, as regards the trial court, is on page 4 of their Petition for Writ of Certiorari.

> 8. If a "freeholder" is interpreted to mean "landowner," then the Act of July 10, P.L. 247, 53 P.S. 45201 *et seq.*, is unconstitutional and the Act is void and of no effect.

(App. 58a.) In the commonwealth court, however, petitioners tried to explain this cryptic objection by arguing first that the Borough Code somehow impinged the right to vote of those residing in the proposed borough. The commonwealth court dismissed this argument as follows:

> We do not propose to treat Appellants' argument lightly, but we fail to see a constitutional voting issue in this case. Section 202 flatly states that all residents of the proposed borough are eligible to vote after a petition for incorporation has been filed with the court of common pleas. Property ownership is indeed a prerequisite to petitioning the court of common pleas. However, the only restriction on *voting* is based on residency. Accordingly, section 202 does not require property ownership as precondition to voting and, therefore, does not unconstitutionally infringe on the right to vote.

(App. 30a.)

The supreme court also dismissed this argument:

> [I]t is claimed that the Borough Code is unconstitutional in that it requires property ownership in order to apply for incorporation. This argument, too, must fail, for the constitutionally critical consideration is who may vote, not who may apply, and although only freeholders are permitted to apply for incorporation, any resident of the area affected may vote on the issue.

(App. 16a.)

The Petitioners also contended that the Borough Code is somehow unconstitutional because, although *all*

residents of the proposed borough may vote on the proposed incorporation, those residing outside the proposed borough may not. This contention is not contained in the Exceptions filed by the Petitioners in the common pleas court. (App. 56a.) On this issue, the commonwealth court ruled:

> Appellants' argument is based on the fact that the residents of the Townships are not entitled to vote on the incorporation of the new borough. Appellants contend that section 202 permits the alteration of the government of the Townships without the consent of those governments, i.e., the people of the Townships. However, section 202 does not authorize an alteration of government without the consent of the people. Instead, section 202 provides for creation of a government, subject to the will of the people.

(App. 30a-31a.)

The supreme court also found the argument to be without merit:

> Appellants also assert that the Borough Code is unconstitutional because it undercuts the right of self-determination of the residents of existing communities. We disagree. The glass is half full, not half empty. The code permits the residents of the proposed borough to voice their views and to determine the form of government under which they will live.

(App. 16a.)

In their Petition for Writ of Certiorari before this Court, the Petitioners raise new constitutional attacks. With respect to the issue regarding the filing of a petition for incorporation by a majority of freeholders of the

proposed borough, petitioners now claim that resident nonlandowners (a class to which none of them belongs) are somehow being denied "participation in the political or electoral process," or that landownership is an unconstitutional "prerequisite to petition for a referendum of general application." With respect to their complaint that nonresidents of the proposed borough do not vote on the Petition, their argument is now cast in terms of equal protection, a theory not heretofore asserted. The failure to preserve these issues below is reason enough to refuse to grant certiorari in this case. In any event, a review of these issues reveals that they are substantively flawed as well.

REASONS FOR REFUSAL OF THE WRIT

A. The instant case presents no issue of federal law so special and important as to warrant review via writ of certiorari.

The instant case comes before this Court nearly four years after the filing of a Petition for Incorporation by Morgantown. During that period, the Borough Advisory Committee, the Court of Common Pleas of Berks County, the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court have exhaustively considered a record now measured in volumes instead of pages. All interested parties have been heard, and the scope of the inquiry, as defined by the Borough Code, has been exceedingly broad. The issues central to the determination of borough incorporation, as identified by Pennsylvania's Borough Code, are peculiarly local ones and present no genuine federal issue. Determinations such as

the adequacy of community support services, the existing and potential commercial, residential and industrial development of land within the Commonwealth, and the respective advantages and disadvantages of borough incorporation are traditionally made by the State, so that unique economic and geographic concerns are fully considered. Simply put, every Pennsylvania court involved in the process has determined that the evidence overwhelmingly supports incorporation, and the constitutional afterthoughts now asserted by Petitioners are nothing more than still another attempt to reverse these factual determinations.

As stated by this Court in *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955), certiorari may be granted only when "special and important reasons," beyond the merely "academic and episodic" and of interest to more than "particular litigants" arise. No such reasons exist in this case. The central issue raised by the Petitioners before this Court, the constitutionality of the landowner/nonlandowner classification for the right to initiate the incorporation process, is truly an "academic" one. These Petitioners are not even members of the class allegedly discriminated against, i.e., nonlandowning residents of the proposed borough. Their attempt to assert rights of those who are is misdirected in that those who actually are nonlandowning residents of the proposed borough voted overwhelmingly in favor of incorporation. In short, Petitioners are asking this Court to review a constitutional issue which is not theirs to raise and which was not raised by those who could have raised it.

It must also be noted that Petitioners suggest no reasons to this Court why review of the overall process of borough incorporation under the Borough Code is of import to any one beyond them, and, indeed, they choose to not even describe that process, in its entirety, to this Court. Their strategy of focusing on but portions of that process, without discussion of the many and varied ways that the process is designed to, and did, protect interests of all concerned, unduly exaggerates the significance of the issues they assert. It is submitted that this case, when the issues are properly framed, lacks the "special and important" quality requisite for the grant of certiorari.

B. The land ownership requirement for the filing of a petition for incorporation is neither an unconstitutional prerequisite to participation in the political or electoral process, nor an unconstitutional prerequisite to petition for a referendum of general application.

1. The Petitioners lack standing to attack the Borough Code's freeholder requirement for the filing of a petition for incorporation.

As stated by this Court in *United States v. Raines*, 362 U.S. 17 (1960), "[t]he delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases . . . ." A "closely related corollary" of this rule is that "a litigant may only assert his own constitutional rights or immunities." *Id.* at 22.

Petitioners' primary challenge to the Borough Code is that only resident landowners within the proposed borough, not residents who own no land therein, may

initiate the incorporation process by the filing of a petition. However, the petitioners in this case are not residents of the proposed borough. Nonetheless, they are attempting to assert rights which flow, if at all, only to those so situated. In other words, a statute which grants the right to petition for incorporation to resident landowners of the proposed borough, but not to residents who own no land, has no effect on and can cause no injury to individuals who are not even residents of the proposed borough. See *Turner v. Fouche*, 396 U.S. 346 (1970) (where challenged legislation involved a classification of landowner and nonlandowner, the district court's granting of a motion to intervene of a nonlandowner was "for the express purpose of adding a party plaintiff to the case to ensure that the court could reach the merits of [the] issue.") *Id.* at 361, n.23. Indeed, there is not even a suggestion anywhere in the record that any nonlandowning resident of the proposed borough was ever precluded from filing a petition and, given the overwhelming vote in favor of incorporation, a vote in which those nonlandowning residents fully participated, the result which did obtain was desired by all but one sole resident. Accordingly, the issue is an academic one, and these nonresident petitioners have no standing to raise it.

2. The Borough Code does not establish any unconstitutional impediment to participation in the political or electoral process.

Until the filing of the instant Petition for Writ of Certiorari, the Petitioners had sought, without success, to argue to both the commonwealth court and the supreme court that a nonlandowner resident's right to vote on the

incorporation issue was somehow unconstitutionally infringed by the Borough Code. The argument was flatly rejected by both courts for good reason. Section 202(d) of the Borough Code specifically requires a vote "of the *residents* of the proposed borough." (Emphasis added.) There is no land ownership requirement for the right to vote on the issue, and, as found by Pennsylvania's appellate courts, there is no "right to vote" issue involved in this case. Indeed, the residents of the proposed borough could clearly have defeated incorporation by voting against it.

Before this Court, the Petitioners, focusing on only a portion of the statute, now contend that the Borough Code's requirement that only a majority of resident landowners may initiate the lengthy incorporation process establishes an unconstitutional prerequisite to "participation in the political or electoral process." The petitioners argue that this Court's decision in *Quinn v. Millsap*, 491 U.S. 95 (1989), is dispositive of the issue. Aside from the fact that Petitioners' argument in this Court was not preserved below and has been waived, *see, e.g., Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 77 (1988) ("a party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon"), the argument is without merit.

At issue in *Quinn* was the constitutionality of a provision of the Constitution of Missouri which authorized the creation of a "board of freeholders" to propose a reorganization of the governments of the City of St. Louis and St. Louis County. In holding that the landowner requirement

for service on the board was not rationally related to any legitimate state purpose and thus violated the equal protection clause, this Court noted that "[m]embership on the board of freeholders is a form of public service," which its earlier precedents, specifically *Turner v. Fouche*, 396 U.S. 346 (1970), had directed could not be limited to only those who own land. This Court was concerned with the "scope of [the Board's] mandate," to "draft and submit a plan to reorganize the entire governmental structure of St. Louis city and county." *Quinn*, 491 U.S. at 109. Given this broad mandate, this Court concluded that nonlandowner residents could not constitutionally be excluded from the board.

Quinn actually supports the result in this case, which does not involve a land ownership requirement as a prerequisite to "public service." Indeed, the only "public service" aspect of this case was that performed by the Borough Advisory Committee. Residents who do not own land are eligible to serve on that Committee, and, indeed, did so in this case. In fact, the requirements for the contents of a petition for incorporation call for nothing more than a suggestion of the name of the new borough and a description of the land to be included in it.[4] As set forth in 53 P.S. § 45203:

> *Contents of Petition.* The petition shall set forth the name of the proposed borough, with a particular description of the boundaries thereof and be accompanied with a plot of the same. . . .

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[4] The Petitioners state (at page 14) of the Petition for Writ of Certiorari that the voters are "limited to the question as proposed by the freeholder." This is misleading. A review of the record before the Borough Advisory Committee and the Pennsylvania courts reveals that numerous issues were raised and determined, and the scope of inquiry was exceedingly broad.

Certainly the submission of this information cannot be equated to the formulation of a "plan of reorganization" as the Petitioners would argue.

From the filing of the petition forward, the Borough Code assures that nonlandowning residents participate in the incorporation process. In this case, *two nonlandowning residents actually served on the Borough Advisory Committee,* and reviewed the sixty-seven exhibits and considered the voluminous testimony as to the advantages and disadvantages of incorporation. In accordance with the Borough Code, nonlandowning residents did appear before the Court and were heard on the issue. Finally, and ultimately, again in accordance with the Borough Code, all nonlandowning residents had an opportunity to vote on the question of incorporation, and were overwhelmingly in favor of it. Clearly, it is in the proceedings of the Borough Advisory Committee, and the subsequent proceedings before the common pleas court, where the type of public debate and discussion similar to that in *Quinn* occurs and, unlike the situation in *Quinn*, nonlandowner residents in this case were an integral part of that process, at every step of the process.

There is no "public service" involved in the mere filing of a petition for incorporation and, at the first step in the incorporation process where something akin to "public service" materializes, nonlandowner residents may, and in fact did, participate. The Borough Code's process for incorporation is, thus, constitutional.

3. The Borough Code provides a pragmatic and balanced approach to borough incorporation which recognizes the rights of both landowners and nonlandowners.

In a thinly disguised resurrection of their twice rejected claim that the Borough Code unconstitutionally infringes upon the right to vote, petitioners assert in Section I.B. of their Petition for Writ of Certiorari that the freeholder requirement for initiating the lengthy process of borough incorporation must be unconstitutional for some other unspecified reason, as it is a "prerequisite to petition for a referendum of general application." Every case cited by the Petitioners, however, involved a voting rights issue, and thus has no applicability to this case. See *Kramer v. Union Free School District*, 395 U.S. 621 (1969) (right to vote at annual school district meetings); *Hill v. Stone*, 421 U.S. 289 (1975) ("dual box" election procedure); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (right to vote on general obligation bonds); and *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977) (majority voting system to approve a county charter). Indeed, the *Town of Lockport* decision was not even concerned with a landowner requirement. Accordingly, because the Borough Code not only permits nonlandowning residents to vote, but also assures their participation in a meaningful way at every stage of the incorporation process, it is a constitutional and effective procedure for the incorporation of boroughs.

The Petitioners acknowledge, as they must, that the several states have historically enjoyed wide latitude in matters of local government. *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). Moreover, their citation to a list of statutes

which make land ownership a prerequisite to some activity, far from suggesting a reason for this Court to grant certiorari, instead suggests that those states have found good and valid reasons for continuing land ownership requirements in certain limited instances. A number of such reasons were identified by this Court itself in *Ball v. James*, 451 U.S. 355 (1981). In that case, the state of Arizona's voting scheme limiting election of directors to the water reclamation district to landowners and apportioning voting power by amount of land owned was held *not* to violate the equal protection clause. This Court based its decision on the fact that the water district did not possess or exercise normal governmental powers, and that its functions, even with respect to water issues, were narrow. This Court also noted that because the landowners' property was subject to liens to secure bonds, and also subject to the acreage based taxing power of the district, landowners had a disproportionate interest in the make-up of the district.

In comparing *Ball* to the instant case, it must first be noted that *Ball* involved a voting rights issue, where this Court has been historically alert to question any type of classification. No such issue appears here, and a constitutional infirmity is thus not involved in this case. Moreover, the mere filing of a petition which does nothing more than suggest the name of the proposed borough and outline its boundaries involves no exercise of any governmental power, not even something analogous to the narrow powers of the water district in *Ball*. The filing of the petition does nothing more than initiate what, in this case, was a lengthy debate and discussion of the entire

incorporation process, both procedurally and substantively. Again, the constitutional concerns in this case are even less acute than those presented in *Ball*.

Good reasons exist for the classification at this initial stage of the procedure for incorporation established by the Borough Code. In the first place, it is the petition which defines what land will be within the proposed borough and thus those whose land is to be so affected would have an obviously unique and particular interest. Secondly, similar to the situation in *Ball*, the landowners' status as landowners subjects them to a real estate tax, which a borough may levy pursuant to the power granted to it in 53 P.S. § 46302. Finally, to grant the ability to initiate the incorporation process to nonlandowners would provide disproportionate power to them. If incorporation of a proposed borough could be initiated by tenants and lessees, their will could be unfairly imposed on those who purchased land with a view toward living in a particular township. On the other hand, nonlandowning residents may prevent a unilateral change by landowners alone as they can defeat incorporation at the ballot box. Accordingly, assuming that this Court could or would ever reach the issue, the limitation imposed at the initial stage of the borough incorporation process is a rational one, preserving the rights of landowner and nonlandowner alike.

C. It is not a denial of equal protection of the law to limit the right to vote to all those residing within the proposed borough.

1. The Petitioners have not preserved below the equal protection argument they now raise in this Court.

The Petitioners now contend that it is a violation of equal protection of the law to deny the vote on incorporation to those who live outside the limits of the proposed borough. Although Petitioners, who are nonresidents of the proposed borough, do have standing to raise this claim, they did not do so in the courts below. Before the Pennsylvania courts, this issue was raised only as a violation of provisions of Pennsylvania's constitution,[5] with only vague and undefined claims that there was a federal constitutional violation involved as well. Again, the Court's decision in *Bankers Life, supra,* precludes consideration of the issue now raised at this final stage, and the language of *Bankers Life* warrants repeating: "[A] party may not preserve a constitutional challenge by generally invoking the Constitution in state court and awaiting review in this Court to specify the constitutional provision it is relying upon." Petitioners have not preserved their equal protection claims.

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[5] Of course, no constitutional violation was found by the Pennsylvania appellate courts.

2. The 1981 amendments to the Borough Code struck a practical and constitutional balance between the rights of those within and those without the proposed borough.

Both the commonwealth court and the Pennsylvania Supreme Court recognized, in the context of Petitioners' challenge pursuant to Pennsylvania's constitution, that it makes perfect constitutional sense to limit the vote on incorporation to those within the proposed borough. As aptly stated by the commonwealth court:

> Section 202 does not authorize an alteration of government without the consent of the people. Instead, section 202 provides for creation of government subject to the will of the people.

(App. 30a-31a.) This Court itself has stated that it is "uniformly recognized that a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders." *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 68 (1978). Accordingly, even if the Petitioners' equal protection claims are considered by this Court, they are wholly without merit.

It must also be emphasized that prior to the 1981 amendments to the Borough Code, there was no provision requiring that the residents of the affected area be permitted to vote on the issue of incorporation. Conceivably, the prior act may have been deficient in this respect, because nonlandowning residents of the area proposed to be incorporated had little say in the process.

It is clear that in addressing the problem by way of the 1981 amendments, the Pennsylvania legislature attempted to balance the interests of those affected by giving *all residents* of the proposed borough the right to

vote, while at the same time limiting that right to only those living in the affected area. Obviously, had it done otherwise, incorporation of boroughs (a matter on which the Pennsylvania legislature and the courts look with favor)[6] would have come to an end. The remaining residents and the governmental units from which the borough would be carved would nearly always oppose the incorporation so as not to lose either tax revenues or control.

It is also clear that the Borough Code provides nonresidents, such as the individual Petitioners here, with ample opportunity to voice their concerns and interests throughout the incorporation process. That they did in fact do so is beyond doubt. The Borough Advisory Committee is directed by the express language of the Borough Code to consider, among other things, the financial or tax effect of borough incorporation upon the existing governmental units. 53 P.S. § 45202(c)(3). It was specifically found by the Borough Advisory Committee and the court

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[6] In one of the earliest cases which considered the matter of the incorporation of a borough, *Incorporation of the Borough of Edgewood*, 130 Pa. 348, 18 A. 646 (1889), the Supreme Court of Pennsylvania said:

> The law contemplates the formation of boroughs out of villages and adjacent territory; and when the people in the village and its adjacent territory, with almost entire unanimity, ask incorporation, it would seem to be a wilful disregard of the intention of the legislature in its borough legislation, and the rights of the people thereunder, to refuse them borough privileges.

130 Pa. 352-53.

of common pleas in this case that "the existing municipalities, not having encouraged nor provided incentives to the applicant or previous owners to develop the area, would now welcome the new development and, therefore, not suffer any significant adverse effects." (App. 14a.) Accordingly, the process of incorporation set forth in the Borough Code was designed to protect and actually did protect the interests of all nonresidents of the proposed borough.

CONCLUSION

It is clear that the constitutional issues now being raised were neither properly presented nor preserved in the Pennsylvania courts, and that, even assuming that they were, there is no merit to them. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

NO. 91-92

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

CAERNARVON TOWNSHIP, et al.
Petitioners

v.

MORGANTOWN PROPERTIES
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Petitioners preserve the equal protection issues before this Court with sufficient precision before the trial court?

2. Do the Petitioners have standing to challenge the alleged unconstitutionality of a statute:

   a. Fencing them out of the vote on a ballot question seeking to carve a new municipality with full governmental powers out of their existing municipalities?

   b. Granting to landowners only the opportunity to place on the ballot a proposition to create a new municipality with full governmental powers within boundaries prescribed by them?

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REPLY TO BRIEF IN OPPOSITION

I. PETITIONERS DID PRESERVE THE EQUAL PROTECTION ISSUES BEFORE THIS COURT WITH SUFFICIENT PRECISION BEFORE THE TRIAL COURT.

On March 28, 1988, Petitioners filed a detailed motion with the trial court raising the issues presented herein and served it appropriately. The Attorney General of Pennsylvania decided not to participate. Appendix 9a, 1a - 7a. (App. hereafter). Paragraph 13 of the motion invokes the Equal Protection and Due Process clauses of the United States Constitution's Fourteenth Amendment and federal election laws are cited in paragraphs 14 - 16. Pointing to the creation of different classes of citizens and voter disenfranchisement, Petitioners attack as unconstitutional the freeholder requirement for petitioning to create a new municipality and the restriction of the vote on the proposition to those residing within the proposed municipality. Paragraphs 17 and 19 of the motion. App. 4a - 5a.

Respondent's reliance on *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), is misplaced. There, Appellant's general allegation in the lower court that a punitive damage award was constitutionally excessive was found inadequate to preserve the issue. The specificity of Petitioners' motion is self-evident. And, the two Pennsylvania appellate courts which reviewed this case were presented with the motion's specific constitutional claims and addressed them. See Appendix to Petition for Certiorari, 16a and 28a - 31a.

II. PETITIONERS HAVE STANDING TO CHALLENGE THE ALLEGED UNCONSTITUTIONALITY OF THE STATUTE IN QUESTION.

A. Petitioners have standing to raise the challenged statute's provision fencing them out of the vote on a ballot question seeking to carve a new municipality out of their municipalities.

"Petitioners, who are nonresidents of the proposed borough, do have standing to raise this claim. . . . " Respondent's Brief in Opposition at 20. Also, see discussion of standing below.

B. Petitioners have standing to raise the challenged statute's provision granting to freeholders (landowners) only the opportunity to place on the ballot a proposition to create a municipality with full governmental powers within boundaries drawn by them.

Petitioner Kathleen Hood, a resident of Robeson Township (one of the municipalities out of which Respondent/Freeholder petitioned to carve the borough of New Morgan) was never a freeholder and lived with her parents. See her Affidavit and Suggestion of Record and her testimony. App. 10a - 13a.

The challenged restrictions of political rights deny access to the ballot : nonlandowners cannot petition to create a municipality and voters of the existing municipalities from which the new municipality is to be carved cannot vote on its creation unless they reside in it.

Petitioners meet both the constitutional test for standing under Article III of the United States Constitution (injury,

causation and redressability) and this Court's prudential test[1].

> "[A] person who does not own real property has Article III standing to challenge under the Equal Protection Clause a state-law requirement that one own real property in order to serve on a particular government board. " *Quinn v. Millsap*, 491 U.S. 95, 103 (1989).

Petitioners' facial challenge to the statute's denial of political rights (as in *Quinn*) from the inception of this controversy, gives them standing. *Id.*, text and note 8, citing *Turner v. Fouche*, 396 U.S. 346 (1970).

Nevertheless, Petitioner Hood and other nonlandowners are injured by a statute which is underinclusive of them and overinclusive of freeholder interests which are the only ones permitted to petition for a ballot question to create a municipality. The denial of petition rights to one group while granting them to another is denial of an equal opportunity for self-determination. The freeholders' exclusive petition rights subject citizens to the wishes of corporate property interests which can draw the exact boundaries of a new municipality with full governmental powers and thus control the outcome of a vote on the issue by fencing out unfriendly voters[2]. In fact,

---

[1] *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 472 (1982).

[2] The challenged statute's scheme provides for no alteration of the boundaries proposed by the freeholder and automatically endows the new municipality with full local governmental powers under the Borough Code upon an affirmative majority vote of the voters within the proposed borough. The review process (*Cont.*)

Respondent is the sole landowner of the proposed municipality; of the seventeen residents therein, eleven were registered voters who were either tenants or employees of Respondent. Petition for Certiorari at 3-5. See *Orr v. Orr*, 440 U.S. 268 (1979), where standing was granted to a man challenging the inequality of a statute allowing alimony to women only although he claimed no alimony.

Nonlandowners are also injured by their inability to file a preemptive or competing petition to incorporate which would include that part of the freeholder's land over which nonlandowners would desire to continue to exercise zoning and other legitimate municipal controls through their elective representatives or through direct participation in administrative and judicial proceedings. The negative economic and environmental consequences of zoning may serve as predicates for standing. *United States v. SCRAP*, 412 U.S. 669 (1973); *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Valley Forge Christian College*, 454 U.S. at 486.

(*2 Cont.*) from petition to vote concerns itself only with the desirability of the proposal based on police powers, land development and financial impacts. As a ballot question the petition is worded exactly as originally proposed. See Respondent's Brief in Opposition at 1-2. In an attempt to distinguish this case from *Quinn v. Millsap, supra*, Respondent embellishes the review process by dwelling on its length, the number of exhibits, the "overwhelming" vote for the petition [a 9 to 1 vote] and even incorrectly asserts that "nonlandowning residents did appear before the Court and were heard on the issue...." Respondent's Brief at 15, 16. There was no evidentiary hearing before the Court. No citizens were heard.

The denial of petition rights is ultimately a denial of the right to vote on a question one would like to frame but may not[3].

The individual petitioners herein filed a zoning appeal from the issuance of a permit to Respondent for a trash incinerator and succeeded in having it revoked. Respondent circumvented that loss by using petition rights reserved to landowners to form its own municipality. Petition for Certiorari at 3.

Landowner/petitioners herein are also injured by Respondent's circumvention of an adverse zoning decision and by their inability to vote on a petition which nonlandowners might present. A non - discriminatory petition process increases the potential for making political choices from among differing points of view. The loss of interracial associational rights qualifies as an injury supportive of standing. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209-10 (1972). The loss of fundamental political rights such as the rights of political association and petition and the dilution of the franchise constitutes injury. United States Constitution, Amendments I and XIV. The controversy is concrete and the injury palpable. See

---

[3] "[All] voting-related rights are rights to participate in... [the election] process, and the import of the process for our system of government freights them with their indisputable moment." Footnote omitted. See L. Tribe, *American Constitutional Law*, Sec. 13-1 at 1062 et seq. (2d ed. 1988). The fundamental essence of voting-related rights is not satisfied when the right to participate in the political process is truncated or weakened in any way including class or economic distinctions or by limiting a voter to casting a ballot on a question which may only be presented by another class of citizens or by economic interests. See discussion in Petition for Certiorari, Section B at 11-13.

Duke Power Co., supra.

Petitioners also have standing to raise the rights of nonlandowners who may not be able to assert them. See *Barrows v. Jackson*, 346 U.S. 249, 257 (1953). That no one was shown to have been barred from filing a petition because of the freeholder requirement is of no moment. The identical argument was rejected in *Turner, supra*, at 361. See *Orr, supra*. The 17 nonlandowners and sole residents of the proposed borough (11 of whom are voters) are Respondent's financial captives and beneficiaries as tenants and employees. See page 4, *supra*. Those not wishing to live in a company town, as demonstrated by one citizen who (protected by the secrecy of the ballot) voted against the borough incorporation, would be constrained from challenging the statute in question. Respondent's Brief at 7. No challenge could be expected from those who favor the company town because it benefits them. When an unconstitutional provision is used to benefit a person whose rights are denied, a third party injured thereby may assert said rights. See *Buchanan v. Warley*, 245 U.S. 60 (1917), where a caucasian seller of real estate could challenge the unconstitutionality of an ordinance limiting black residency when a black buyer cited the ordinance in seeking to avoid specific performance.

Petitioners suffer disenfranchisement when they are fenced out of the vote on the proposed municipality to be carved out of their municipalities. Thus their right to self-determination as part of an existing government and community is undermined.

Causation is found in Respondent's use of the challenged

provisions to deprive the individual petitioners of their zoning victory and to deprive them of all zoning and other governmental controls over Respondent's land and the financial, environmental and societal benefits derived therefrom.

A decision favorable to Petitioners will redress the loss of their zoning victory and return the parties to the governmental status quo ante. Also, Petitioners will regain equal protection of the laws by not being subjected to a means test when dealing with the fate of their community.

The prudential principles of standing are satisfied. As demonstrated above, the instant Petition sets forth specific grievances suffered by Petitioners within a zone of constitutional interests applicable to them.

Respondent's Brief (at 19, 22) views the injuries done to Petitioners as benefits safeguarding the freeholder's right to form its own government by preventing nonlandowners from filing their own petition because that would give them "disproportionate power", and by fencing out from the vote those outside the enclave because they "would nearly always oppose the incorporation" of the new municipality. "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." *Carrington v. Rash*, 380 U.S. 89, 94 (1965), followed in *Cipriano v. City of Houma*, 395 U.S. 701, 704[4].

---

[4] Unless it is demonstrated that "all those excluded are in fact substantially less interested or affected than those the statute includes" and that the "exclusions are necessary to promote a compelling state interest" the exclusionary provisions (*Cont.*)

CONCLUSION

Respondent's claim (page 18 of its brief) that freeholder political rights statutes must be valid because they exist ignores the rational basis test of *Quinn v. Millsap*, 491 U.S. 95 (1989), and a long line of precedents knocking down barriers to those rights such as race, sex, property and residency. However, these barriers survive in 30 states warranting the issuance of a writ of certiorari. App. 14a - 23a.

Respectfully submitted,

Norman Ashton Klinger
Counsel of Record
NORMAN ASHTON KLINGER
& ASSOC., P.C.
612 Swede Street
Norristown, PA 19401
(215) 275-1112

(*4 Cont.*) cannot pass constitutional muster. *Id.* at 704, 705. Respondent relies on the advancement of its private pecuniary interest as a basis for this discrimination and asserts that "the Pennsylvania legislature and the courts look with favor" on borough incorporation, citing *Incorporation of the Borough of Edgewood*, 130 Pa. 348, 18 A. 646 (1889). Respondent's Brief at 22. That case is beside the point as it relates to the incorporation of a "village and its adjacent territory" and not to the decomposition of incorporated municipalities. No reason for this discrimination is found in the statute nor cited by the Supreme Court of Pennsylvania. The state Attorney General did not participate.

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION

IN RE: INCORPORATION : 193 Misc.
OF BOROUGH OF : Docket
NEW MORGAN : 1987

RULE TO SHOW CAUSE

AND NOW, this day of , 1988, upon consideration of the within Motion a Rule is entered upon Applicant to show cause why the Court should not Dismiss the Application for Incorporation.

RULE RETURNABLE on, 1988.

BY THE COURT:

_____

J.

Extract from the record of said court
Certified this 6th day of September 1991

JAMES P. TROUTMAN (Seal of the Court)
Clerk of Common Pleas - Criminal Division
Per Yvonne Sassoc Deputy

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

IN RE:	INCORPORATION	: 193 Misc.
	OF BOROUGH OF	: Docket
	NEW MORGAN	: 1987

MOTION AND MEMORANDUM AND RULE TO SHOW CAUSE WHY THE APPLICATION FOR INCORPORATION SHOULD NOT BE DISMISSED FOR REASONS OF UNCONSTITUTIONALITY

Citizen - Intervenors come before the Court and submit the following reasons in support of their request for dismissal of the Application for Incorporation:

1. The Application is based on 53 P.S. 45202.

2. Said section limits the right to file an application for incorporation to "freeholders residing" in the proposed borough.

3. "Freeholder" has been defined as one who owns real property including a corporation. *In Re Incorporation of Borough of Seven Fields*, 462 A.2 865, 869 (Pa. Cmwlth 1983).

4. "Residing" has been defined to include a corporation which maintains its business office in the proposed borough.

5. Article I, Section 2 of the Pennsylvania Constitution states:

> All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness. For the

advancement of these ends they have at all times an *inalienable* and *indefeasible* right to alter, reform or abolish their government in such manner as they may think proper. (Emphasis supplied).

6. Article I, Section 2 of the Pennsylvania Constitution embraces only three known recognized methods through which the whole people can consent to the alteration of existing lawful government: 1) That provided by the constitution; 2) a law pursuant to which a representative body of the people is given the power of the people to prepare revisions of existing government and 3) a revolution. *Wells v. Bain* 75 Pa. 39, 15 Am Rep. 563 (1873).

7. Article VII, Section 1 of the Pennsylvania Constitution prescribes the qualifications of electors and does not provide for any means test or property ownership as a qualification for an elector nor as a pre-condition or precursor triggering the right to vote.

8. The Pennsylvania Constitution of 1874 prescribed a means test (now repealed) for persons twenty-two years of age and older in the form of a state or county tax. Article VIII, Sec. Fourth, Purdon's Constitution, Articles 1 to 2, p. 140.

9. Article I, Section 5 of the Pennsylvania Constitution provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

10. No constitutional qualification of a voter can be abridged, added to, or altered by the legislature. *Thompson v. Ewing*, 1 Brewst. 67, 103 (1861); *Page v. Allen*, 58 Pa. 338, 98 Am. Dec. 272 (1868); *McCafferty v. Gwyer*, 59 Pa. 109 (1868); *Rishel v. Luther*, 2 Dist. 769, (1893). The right to vote cannot be qualified or restricted. *Independence Party Nomination*, 57

A. 344, 208 Pa. 108 (1904). An act which either expressly or by its operation deprives a qualified elector of his right to vote is unconstitutional and void. *McCafferty, supra*; *Paterson v. Barlow*, 60 Pa. 54 (1869); *Commonwealth v. Martin*, 20 C.C. 117, 6 Dist. 645 (1897).

11. Article I, Section 26 of the Pennsylvania Constitution states:

> Neither the Commonwealth nor any political subdivision thereof shall deny to any person the enjoyment of any civil right, nor discriminate against any person in the exercise of any civil right.

12. Article I, Section 1 of the Pennsylvania Constitution holds that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights...."

13. The United States Constitution guarantees to every citizen the equal protection of the laws and the application of due process of law. U.S. Const., Fourteenth Amendment.

14. Federal election laws mandate equal treatment to all individuals and forbid different "standards, practices, or procedures" to determine eligibility to vote between different individuals. 42 USCS Sec. 1971 (a)(2).

15. The United States Congress has made a finding and declared that "the constitutional right of citizens to vote is denied or abridged" when payment of a poll tax is required as a precondition to voting. 42 USCS Sec. 1973 h.

16. 42 USCS Sec. 1973 aa states: "(a) No citizen shall be denied, because of his failure to comply with any test or device, his right to vote in any...local election...."

17. The "freeholder" requirement of 53 P.S. 45202 violates the Pennsylvania and United States Constitutions and Federal Election Laws in that it creates different classes of citizens,

makes ownership of real estate a precondition and/or precursor to the right to vote and even empowers corporations to initiate a process for the creation of a new government while denying that power to non-propertied voters.

18. Article I of the Pennsylvania Constitution, the Declaration of Rights, supersedes all delegated government power.

> To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate. Article I, Sec. 25.

19. 53 P.S. 45202 violates the Pennsylvania and United States Constitutions and Federal Election Laws by disenfranchising citizens of a municipality who do not reside in a proposed borough's geographical area, by allowing only those who reside within that area to vote on whether or not such a borough should be created.

20. Article IX, Section 8 states:

> Uniform Legislation. The General Assembly shall, within two years following the adoption of this article, enact uniform legislation establishing the procedure for consolidation, merger or change of the boundaries of municipalities.
>
> Initiative. The electors of any municipality shall have the right, by **initiative and referendum**, to consolidate, merge and change boundaries by a majority vote of those voting thereon in each municipality, without the approval of any governing body.
>
> Study. The General Assembly shall designate an agency of the Commonwealth to study consolidation, merger and boundary changes, advise municipalities on all problems

which might be connected therewith, and initiate local referendum....(Emphasis supplied).

21. The legislature failed to enact uniform legislation regarding changing of boundaries of municipalities within the required time period. Therefore, the constitutional procedure prescribing change only by initiative and referendum prevails. Cf. *Derry Township v. Borough of Hummelstown*, 326 A. 2d 342 (Pa. 1974), notwithstanding *Bear Creek Township v. Borough of Penn Lake Park*, 340 A. 2d 642 (Pa. Cmwlth 1975) which narrowly construed Art IX, Sec. 8 while ignoring the strong mandates of the Declaration of Rights. See also, *In re Establishment of Boundary Between Collier Township and Robinson Township*, 360 A. 2d 841 (Pa. Cmwlth 1976) to the effect that "...the Code, as it relates to the alteration of township lines to suit the convenience of the inhabitants, is...invalid." Id. @ 842. And see *Laflin Borough v. Yatesville Borough*, 404 A. 2d 717 (Pa. Cmwlth 1979) distinguishing a change of boundary line from the adjustment of a boundary line disputed when it is uncertain where the boundary is, and declaring: "Whether a municipal boundary should be changed is a proper question for the ballot." Id. @ 719.

22. 53 P.S. 45202 violates the intent and spirit of the Pennsylvania Constitution which mandates uniformity in the legislation regulating the physical form of municipalities.

23. 53 P.S. 45202 embodies an unlawful delegation of power by the legislature to the judiciary in that said section lacks sufficient standards and clarity to define the role and function of the judiciary in considering applications filed pursuant thereto.

24. 53 P.S. 45202 embodies an unconstitutional delegation of power by the legislature to a private corporation or

association of "power to...interfere with any municipal improvement, money, property or effects...." Article III, Sec. 31, Pennsylvania Constitution. In its application Sec. 45202 has been interpreted to permit a resident corporation to file an application for the creation of a borough. *In re Incorporation of Borough of Seven Fields*, 462 A. 2d 865, 869 (Pa. Cmwlth 1983). If successful, such an application by a corporation would interfere with municipal improvement (roads), money (taxes and other revenues), property or effects." (The standing of applicant herein is challenged as it is not a corporation, is not a legal person and, therefore, cannot have a residence in the area of the proposed borough).

WHEREFORE, Intervenors pray that the Court will grant this Motion and dismiss the application.

NORMAN ASHTON KLINGER AND ASSOCIATES, P.C.
612 SWEDE STREET
NORRISTOWN, PA 19401

BY: (Signed) NORMAN ASHTON KLINGER, ESQUIRE
Attorney for Intervenors

DATE: 3-28-88

NORMAN ASHTON KLINGER & ASSOCIATES, P.C.
ATTORNEYS AT LAW
612 SWEDE STREET
NORRISTOWN, PA 19401-3994

(215) 275-1112

FILE NO.

March 28, 1988

Hon. Thomas J. Eshelman, Judge
Berks County Court of Common Pleas
Courthouse
Reading, Pa 19063

RE: Incorporation of Borough of New Morgan
NO. 193 Misc. 1987
Berks County

Dear Judge Eshelman:

Enclosed please find a copy of a combined Motion and Memorandum and Rule to Show Cause challenging constitutionality of the applicable law in accordance with your request to do so. The original is being filed of record.

Respectfully,
(Signed)

N[illegible]:em
Enc.
cc: Henry M. Koch, Jr., Esq. [Attorney for Morgantown Properties]
Brett A. Huckabee, Esq.
Norman E. Dettra, Jr., Esq.

COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL

LeRoy S. Zimmerman
ATTORNEY GENERAL
June 2, 1988

Reply To:

15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1471

Mr. Norman A. Klinger, Esq.
612 Swede Street
Norristown, PA 19401-3994

Re: Incorporation of Borough of New Morgan
No. 193 Misc. 1987 (1598)

Dear Mr. Klinger:

This acknowledges receipt of your Notice pursuant to Rule 235 of the Pennsylvania Rules of Civil Procedure.

This matter will be reviewed by our staff to determine if our involvement is warranted. If we decide to intervene in the above-captioned case, we will promptly notify you. If no notification is received from this office within thirty days of the date of this letter, please assume that the Attorney General will not be entering his appearance in this matter.

Please advise this office of the final disposition of this matter and of any appellate proceedings in this case. Thank you.

Sincerely,

(Signed)
Maryanne Lewis
Legal Assistant

(Date Stamp)

CLERK OF COURTS
'91 SEP 11 A9:43

NORMAN ASHTON KLINGER & ASSOC., P.C.
BY: NORMAN ASHTON KLINGER Attorney for Intervenors
I.D. NO.: 10198
612 SWEDE STREET
NORRISTOWN, PA 19401
(215) 275-1112

IN THE COURT OF COMMON PLEAS OF
BERKS COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

IN RE:	INCORPORATION	: 193 Misc.
	OF BOROUGH OF	: Docket
	NEW MORGAN	: 1987

INTERVENORS' SUGGESTION OF RECORD

1. Kathleen Hood, an Intervenor herein, testified before the Borough Advisory Committee that she resided with her parents in Robeson Township. See attached Exhibit "A", page 97 of the Notes of Testimony taken on February 2, 1988.

2. On September 4, 1991, Ms. Hood executed an affidavit reaffirming that at no time during the pendency of this action, from its inception to the present, did she own any real estate. See attached Exhibit "B" incorporated herein by reference.

3. It is a matter of public record in the Recorder of Deeds Office of Berks County that Kathleen Hood owned no real

estate from the inception of the instant action to the present.

WHEREFORE, it is hereby suggested of record that at no time during the pendency of this action, from its inception to the present, did Kathleen Hood own any real estate.

Respectfully submitted,
NORMAN ASHTON KLINGER
& ASSOC., P.C.

Date: 9-6-91

By: (Signed)
Norman Ashton Klinger, Esquire
Attorney for Intervenors

EXCERPT FROM NOTES OF TESTIMONY TAKEN 2 FEBRUARY 1988 BEFORE THE BOROUGH ADVISORY COMMITTEE

(Page) 97

Q Miss Hood, where do you live?

A Robeson Township, Berks County, Pennsylvania.

Q With whom do you live?

A I reside with my parents, Edna and David Hood.

Q How long have you resided in Robeson Township?

A I have been in Robeson Township for approximately 30 years.

Q What's your profession?

A I'm an educator by trade.

Q Are you familiar with the developments and proposals of Mr. Carr and Morgantown Properties?

A Yes, I am.

Q How did you become aware of the activities of Mr. Carr and Morgantown Properties?

A I became aware of those activities in December of 1985 when an announcement had come via Philadelphia news that there was a proposed trash-to-steam plant being proposed for Morgantown.

Since that time, I have attended various meetings, hearings and so forth relating to this development.

Q What did you discover in the early course of your acquaintance with Morgantown Properties regarding the proposed mass-burn trash-to-steam plant, regarding any permits that may have been issued?

A On January 7, 1986, I had attended a community meeting which was held in Morgantown Fire Hall, Caernarvon

AFFIDAVIT OF KATHLEEN HOOD

I, Kathleen Hood, residing on Route 82, Box 210, Rd 2, Robeson Township, Berks County, Morgantown, PA, 19543, confirm that I am one of the parties in the Petition for Writ of Certiorari denominated Caernarvon Township, et al. v. Morgantown Properties at No. 91-92 in the United States Supreme Court. Further, I confirm that at no time during the pendency of the underlying action, from its inception to the present, did I own any real estate.

I, Kathleen Hood, verify, depose and say, subject to the penalties of 18 Pa. C.S.A. 4904 for making false statements, that the foregoing averments are true upon personal knowledge.

Date: 9/4/91 (Signature)

KATHLEEN HOOD

(Signature)

Notary Seal
Carole S. Levin, Notary Public
East Earl Twp., Lancaster County
My Commission Expires Oct. 7, 1991
Member, Pennsylvania Association of Notaries

Exhibit "B"

STATE STATUTES GRANTING EXCLUSIVE RIGHTS TO FREEHOLDERS

I. APPOINTMENTS TO PUBLIC SERVICE

ALABAMA

Freeholder or householder to serve in canvassing election returns. Ala. Code Sec. 17-14-1 (1975).

ARIZONA

Freeholder to serve as commissioner setting county highway bond issue. Ariz. Rev. Stat. Sec. 18-232.

ARKANSAS

Freeholder to assess damages caused by grading of public streets and grounds. Ark. Code Ann. Sec. 14-301-105.

COLORADO

Freeholder to determine compensation in eminent domain matters. Colo. Rev. Stat. Sec. 38-1-105 (1989).

DELAWARE

Freeholder to serve on board of assessment. Del. Code Ann. tit. 9, Sec. 1304 (1953).

GEORGIA

Freeholders appraise and settle decedent estates. Ga. Code Ann. Sec. 53-4-12.

INDIANA

Freeholders serve on board to control cemetery management. Ind. Code Sec. 23-14-24-6 (1980).

Freeholders appraise damage to neighboring land in condemnation cases. Ind. Code Sec. 4-17-9-2 (1984).

Freeholders appraise State owned land for sale or other disposition. Ind. Code Sec. 4-18-4-10 (1945).

IOWA

Freeholders appraise islands before sale by State. Iowa Code Ann. Sec. 568.22 (WEST 1924).

KANSAS

Freeholders serve on Zoning Hearing Board; Parks Commission. Kan. Stat. Ann. Sec. 19-2902 (WEST 1970);Sec. 13-1347 (WEST 1949).

KENTUCKY

Freeholders serve on Air Pollution Control Board. Ky. Rev. Stat. Ann. Sec. 77.070 (1986).

Freeholders to be supervisors of taxes. Ky. Rev. Stat. Ann. Sec. 92.260 (1954).

MINNESOTA

Freeholders serve on Planning and Zoning Board. Minn. Stat. Ann. Sec. 366.17 (WEST 1989).

Freeholders serve on Building Commission. Minn. Stat.

Ann. Sec. 374.08 (WEST 1985).

MISSOURI

Freeholders serve on county planning commissions. Mo. Ann. Stat. Sec. 64.520.

NEBRASKA

Freeholders serve as Park and Recreation Commissioners. Neb. Rev. Stat. Sec. 17-952, Sec. 16-696 (1943).

Freeholders serve on board to determine the disposition of money obtained through bond issues. Neb. Rev. Stat. Sec. 10-803 (1943).

NEW MEXICO

Freeholders serve on commission to sell public lands. N. M. Stat. Ann. Sec. 19-4-28 (1978).

OHIO

Freeholders serve on Board of Park Commissioners. Ohio Rev. Code Ann. Sec. 511.19 (Anderson 1986).

Freeholders serve on Board of Governors on Municipal Hospitals. Ohio Rev. Code Ann. Sec. 749.18 (Anderson 1957).

OKLAHOMA

Freeholders serve on County Excise Board. Okla. Stat. Ann. tit. 68, Sec. 3005.1 (WEST 1990).

SOUTH DAKOTA

Freeholders serve on City Airport Boards. S.D. Codified Laws Sec. 50-6-2 (1960).

Freeholders serve on Board of Trustees for county hospitals. S.D. Codified Laws SEC. 34-8-7 (1966).

TENNESSEE

Freeholders serve on Board of Equalization. Tenn. Code Ann. Sec. 67-1-401 (1988).

Freeholders serve as jail inspectors. Tenn. Code Ann. Sec. 41-4-116 (1984).

VIRGINIA

Freeholders appointed to settle border disputes between municipalities. Va. Code Ann. Sec. 15.1-1026 (1950).

WEST VIRGINIA

Freeholders serve on Board of Zoning Appeals. W. Va. Code. Sec. 8-24-51 (1969).

Freeholders serve on Municipal Planning Commission. W. Va. Code. Sec. 8-24-5 (1986).

Freeholders serve as Park and Recreation Commissioners. W. Va. Code. Secs. 8-21-3, 7-11-3 (1969).

WISCONSIN

Freeholders petition for enlargement of cemetery owned

by cemetery or religious associations and freeholders appraise damage to landowners resulting from such enlargement. Wis. Stat. Ann. Sec. 157.064 (WEST 1989). [ALSO 2B]

II. ELECTIONS TO PUBLIC SERVICE POSITIONS

DELAWARE

Freeholders elected as voting inspectors. Del. Code Ann. tit. 15 Sec. 5306 (1953).

IDAHO

Freeholders elected on Board of Commissioners for fire protection districts. Idaho Code Sec. 31-1409 (1986).

INDIANA

Freeholder elected as County Assessor. Ind. Code Sec. 36-2-15-2 (1980).

MICHIGAN

Freeholders elected to village charter revision commission. Mich. Comp. Laws Ann. Sec. 78-14.

MISSISSIPPI

Freeholders elected as supervisors of local government. Miss. Code Ann. Sec. 19-3-3 (1972).

NEBRASKA

Freeholders elected to frame city charter commission. Neb. Const. Art. XI, Sec. 2 (1912).

WASHINGTON

Freeholders elected to city charter commission. Wash. Rev. Code Ann. Sec. 35.22.050 (1965).

II. PETITIONING FOR MUNICIPAL INCORPORATION, BORDER CHANGES

MICHIGAN

Freeholders petition to create township, or change borders or incorporate village. Mich. Comp. Laws Ann. Sec. 46.14, 81.3

OHIO

Freeholders petition to incorporate municipality or village. Ohio Rev. Code Ann. Sec. 707.07, 707.22 (Anderson 1967).

PENNSYLVANIA

See Petition for Certiorari herein.

SOUTH CAROLINA

Freeholders petition for annexation. S.C. Code Ann. Sec. 5-3-50 (1976).

VERMONT

Freeholders petition to annex adjacent territory. Vt.Stat. Ann. tit. 24, Sec. 1316 (1884).

WEST VIRGINIA

Freeholders petition to put annexation on ballot or to annex without vote. W. Va. Code Sec. 8-6-2, 8-6-4

(1989).

Freeholders petition to shrink municipality. W. Va. Code Sec. 8-7-2 (1969).

IV. PETITIONING FOR GOVERNMENT ACTION

COLORADO

Freeholders petition for appointment of committee to investigate county treasury. Colo. Rev. Stat. Sec. 30-10-722 (1990).

FLORIDA

Freeholders consent to inclusion of their land in spaceport territory. Fla. Stat. Ann. Sec. 331.329 (West 1953).

GEORGIA

Freeholders petition to disqualify tax assessors. Ga. Code Ann. Sec. 48-5-296.

NEBRASKA

Freeholders petition for appointment of town officers and for special town meetings. Neb. Rev. Stat. Sec. 23-225, 23- 230 (1943).

Freeholders petition for annexation of land into school district. Neb. Rev. Stat. Sec. 79-403 (1943).

Freeholders petition for compromise of municipal indebtedness. Neb. Rev. Stat. Sec. 10-302 (1943).

Freeholders petition for general bond issue. Neb. Rev. Stat. Sec. 10-409 (1943).

Freeholders petition for improvement of public libraries. Neb. Rev. Stat. Sec. 17-967 (1943).

NEW MEXICO

Freeholders verify claim for medical expenses of sheriff or deputy injured in line of duty. N.M. Stat. Ann. Sec. 4-41-11 (1978).

NEW YORK

Freeholders petition for investigation of unlawful use of municipal money. N.Y. Gen. Mun. Law Sec. 4 (McKinney 1909).

OHIO

Freeholders petition for development and improvement of public buildings. Ohio Rev. Code Ann. Sec. 511.05 (Anderson 1953).

SOUTH CAROLINA

Freeholders petition for municipality to establish hospital. S.C. Code Ann. Sec. 44-7-920 (1976).

SOUTH DAKOTA

Freeholder petitions for appointment of municipal officers. S.D. Codified Laws Sec. 8-3-20 (1963).

TENNESSEE

Freeholder petitions for removal of public officer or

employee. Tenn. Code Ann. Sec. 8-47-116 (1932).

VERMONT

Freeholders petition for construction of public park. Vt. Stat. Ann. tit. 24, Sec. 2501 (1880).

WISCONSIN

Freeholders petition for enlargement of cemetery and appraise damage to landowners resulting therefrom. Wis. Stat. Ann. Sec. 157.064 (WEST 1989).

V. PETITIONING FOR BALLOT QUESTION

DELAWARE

Freeholders petition for vote to create suburban park community. Del. Code Ann. tit. 9, Sec. 625 (1953).

INDIANA

Freeholders petition for vote to establish hospital. Ind. Code Sec. 16-11-1-1 (1949).

Freeholders petition for vote on use of school property. Ind. Code Sec. 20-5-37-2 (1988).

IOWA

Freeholders petition for vote on building or acquiring a public hall. Iowa Code Ann. Sec. 360.1 (West 1974).

MINNESOTA

Freeholders petition for vote to establish a library. Minn. Stat. Ann. Sec. 134.08 (West 1973).

VIRGINIA

Freeholders petition for vote to determine if a housing authority should be created. Va. Code Ann. Sec. 36-4 (1950).

VI. VOTING RIGHTS

FLORIDA

Freeholders vote to create recreation system. Fla. Stat. Ann. Sec. 418.08 (West 1953).

Freeholders vote to authorize construction of public housing project. Fla. Stat. Ann. Sec. 421.54 (West 1953).

Freeholders vote to create special residential or business neighborhood improvement districts. Fla. Stat. Ann. Sec. 163.511 (West 1953).

ERRATA AND CORRECTIONS TO PETITION FOR CERTIORARI

Page	Line	Text
6	10	"...Supreme Court of Pennsylvania affirmed 6 - 2." THIS SHOULD READ: "...Supreme Court of Pennsylvania affirmed 4 - 2. (Only seven justices sit on this court. The Chief Justice did not participate.)
17	2	"III. Freeholder concepts remain inbedded...." THIS SHOULD READ "III. Freeholder concepts remain imbedded...."